S. HRG. 99-589

RELATING TO STOLEN ARCHEOLOGICAL PROPERTY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 605

A BILL TO AMEND SECTIONS 2314 AND 2315 OF TITLE 18, UNITED STATES CODE, RELATING TO STOLEN ARCHEOLOGICAL MATERIAL

MAY 22, 1985

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RELATING TO STOLEN ARCHEOLOGICAL PROPERTY—S. 605

WEDNESDAY, MAY 22, 1985

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Laxalt (chairman of the subcommittee) presiding.

Present: Senators Laxalt, Thurmond, Mathias, and Specter.

Staff present: William Miller, Beverly McKittrick, Steve Dillingham, Bruce Heiman, Nick Allard, Neal Manne, Ralph Oman, Scott Green, and Sharon Donovan.

OPENING STATEMENT OF SENATOR PAUL LAXALT

Senator LAXALT. The subcommittee will come to order.

I would like to welcome Senator Moynihan and our other distinguished witnesses to this hearing on Senate bill 605—a bill to amend the National Stolen Property Act—to overturn the decision of *United States* v. *McClain*.

In the *McClain* case, the National Stolen Property Act was applied to American defendants who were selling in the United States cultural artifacts that originally came from archeological sites in Mexico.

It was not established at trial that the artifacts had been stolen or taken in the American legal sense from the rightful possession of anyone in Mexico. The court upheld their convictions under the National Stolen Property Act and held that the act may apply where a foreign government declares national ownership of its cultural artifacts and imposes restrictions on the export of such artifacts. The foreign government need not reduce them to actual possession.

Those who support Senate bill 605 argue that mere declarations of national ownership by foreign governments should not be sufficient to subject Americans to criminal prosecution. Such property is not stolen in the common law sense of taking it from someone who has possession.

Supporters also point out that the *McClain* decision and the Customs regulations predicated upon that decision conflict with the policy of the act implementing the Unesco Convention on Cultural Property. The Unesco Convention stressed multilateral action to

stop the international flow of pillaged artifacts. *McClain* is clearly a unilateral response.

Opponents of Senate bill 605 contend that the National Stolen Property Act is a vital tool against archeological plunder. Because of the unique nature of archeological artifacts, national declarations and national export restrictions should be, and perhaps must be, sufficient to establish legal ownership of those treasures.

Further, opponents point out that the prosecution in a National Stolen Property Act case of this type must establish that the defendants did, in fact, know of the foreign declaration of ownership. Therefore, the *McClain* decision does not threaten legitimate importers and sellers of objects of art.

Underlying this debate are a number of policy questions. For example, do barriers to free trade in works of art and artifacts promote a nation's preservation of its cultural heritage or do such barriers render it less likely that valuable artifacts will be preserved? A related question is the extent to which the United States should enforce another country's export decisions.

These are difficult questions, but I think all of us can agree that we must promote the preservation of the world's cultural inheritance. Other important values are the promotion of international understanding of foreign cultures through study of archeological resources and the national retention of the most significant works of art. I look forward to the discussion of how best to achieve these goals.

Before I call the first witness, I wish to place several opening statements of committee members in the record, along with a copy of S. 605

[Aforementioned follows:]

OPENING STATEMENT BY CHAIRMAN STROM THURMOND

Mr. Chairman, it is a pleasure to welcome the distinguished witnesses here this morning to consider proposed amendments to the National Stolen Property Act. Senator Moynihan, the sponsor of these amendments, has a strong interest in this subject matter, and I am sure that his comments and those of other witnesses will serve to enlighten us on these important issues.

Among the matters to be discussed today is the decision by the U.S. Court of Appeals for the Fifth Circuit in the case of *United States* v. *McClain*. That decision permits certain cultural properties and art objects to be considered stolen under our laws, if a foreign country declares that it has ownership of the properties. The purpose of the legislation being considered here today is to limit the *McClain* decision, and restrict the application of existing federal criminal provisions.

Arguments will be presented both for and against the proposal of Senator Moynihan. On one side of the issue, supporters maintain that existing law unfairly exposes innocent art collectors and dealers to criminal sanctions for what they consider to be legitimate and desirable business practices. On the other hand, preservationists argue that tough sanctions are necessary to prevent the illegal removal of art treasures belonging to foreign countries. As federal lawmakers, we want to ensure that the legitimate rights of all parties are protected, and that remedies are perceived as fair.

The hearing today will give additional insight into these problems. I am sure that the testimony of these knowledgeable witnesses will help this Subcommittee in its deliberations on these important issues.

OPENING STATEMENT BY SENATOR CHARLES MCC. MATHIAS, JR.

Ownership of works of art and other cultural property has been the source of friction and controversy for centuries. In some cases the dispute is between nations, as when Napoleon's loot was reclaimed by the states from which it had been taken by

conquest. In some cases the dispute is between private individuals. But it is common to every case that the issue is complex, the evidence is elusive and the law is uncertain. Complicating the problem is the fact that different societies have different perceptions of ownership of art and cultural objects.

The stated purpose of S. 605 is to reduce the uncertainties in this area of the law. But simplicity is not always a guarantee of justice. Therefore, this hearing is essential to determine whether S. 605 violates any principle of domestic or international law, whether it is consonant with the UNESCO Convention, whether it will exacerbate international relations and whether it will promote learning and knowledge.

This is a challenge to both proponents and opponents of the bill and I look forward to their testimony.

Opening Statement by Senator Orrin G. Hatch

S. 605—Stolen Archeological Material

Mr. Chairman, and members of the subcommittee, I want to thank you for allowing me to participate in this hearing today. I am here because of the concern I share with all of you relating to stolen archeological material. I believe we all sense a responsibility to preserve the priceless artifacts which tell the story of the human family.

In my own state of Utah, in the Moab Valley, there are remains of remarkable Indian settlements rich in culture. What a priceless story they have and will tell to future generations. Unfortunately, there is a real problem with regards to stealing and other abuses of their archeological treasures.

Consequently, I am familiar and sympathetic to the common cause we all share to protect our national and international heritage. Obviously, there are differences as to the procedures and implementation of law which would best serve this common effort. I look forward to the professional insights and comments relating to the specific proposed bill and the issue generally.

Opening Statement by Senator Joseph R. Biden, Jr.

Mr. Chairman, I would like to thank the witnesses in attendance today as we are about to discuss an issue of great concern and complexity. The issue of ownership of archaeological artifacts and the right to import those artifacts from the countries of origin is something the Congress has been grappling with over the twelve years I have been in the Senate. In 1972 although the Senate unanimously gave its advice and consent to the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention which established general principles for the control of trade in archeological materials, it was not until passage of the Cultural Properties Implementation Act (Public Law 97-466) that provisions of the UNESCO Convention could be implemented.

Also, a subject of this hearing will be the McClain case which was upheld by the 5th Circuit Court of Appeals back in 1979. The government argued successfully that if a foreign country declares itself the owner of certain property within its territory even though it has not been reduced to actual possession and imposes controls over such property to enforce its ownership, its property rights are protected by the NSPA (National Stolen Property Act). Although there have not been similar cases prosecuted since the McClain case, I suspect this case has had a deterrent effect on importation of these artifacts into the United States.

I will be interested in the objections raised by the administration witnesses, particularly the position of the State Department. As a member of the Foreign Relations Committee I am concerned about these unilateral agreements we have with selected countries and the ancillary benefits they may have on other issues of importance to the United States. For example, my work on trying to get better control of the drug problem in this nation requires the support and cooperation of those nations where coca and opium are grown and processed. It may be of mutual interest to many of these small nations who ask us to do more through law enforcement agreements in locating and returning archeological artifacts to reciprocate by doing more in stemming the flow of drugs and narcotics leaving their country.

There are a wide variety of issues that must be considered before passage of this legislation. I believe today's hearing will provide some of the answers that I am looking for.

By Mr. MOYNIHAN:

S. 605. A bill to amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archeological material; to the Committee on the Judiciary.

IMPORTATION OF ARCHEOLOGICAL MATERIAL

● Mr. MOYNIHAN. Mr. President, I rise today to introduce legislation to amend the National Stolen Property Act as it applies to imported archeological and ethnological materials. I am pleased to be joined by my colleague, the distinguished majority leader.

This legislation is a necessary clarification of the Cultural Properties Implementation Act (Public Law 97-466). The CPIA was reported by the Senate Finance Committee and passed in the waning days of the 97th Congress. The CPIA implements the 1972 Unesco Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Cultural Property. It sets forth a clear and comprehensive statement of our national policy concerning the importation of cultural property. Basic to the act is the principle that the United States will act to bar the importation of particular cultural properties, but only as part of a concerted international response to a specific, severe problem of pillage.

The CPIA was enacted only after a long and arduous process of compromise which fairly balanced all competing interests. One part of the compromise which led to the unanimous passage of the act—after a decade of effort—was the clear understanding among all interests, public and private, that the CPIA would establish the definitive national policy regarding the

importation of archeological and ethnological material and that any inconsistent provisions of law would be brought into accord.

During the course of the Finance Committee's consideration of the CPIA, it became apparent that the committee did not have jurisdiction to correct one such inconsistent provision: the definition of stolen property under the National Stolen Property Act, and that act's application to the importation of archeological and ethnological materials. This matter is properly within the jurisdiction of the Judiciary Committee. Consequently, Senators DOLE, MATSUNAGA, and I introduced legislation late in the 97th Congress, S. 2963, and again in the 98th Congress as S. 1559. Today we are reintroducing that legislation with modest technical modifications to comport with the style of the National Stolen Property Act. We understand that the Judiciary Committee will promptly schedule hearings and hope the bill will be enacted into law this year.

The need for this bill arises from a controversial decision by the Court of Appeals for the Fifth Circuit in the case of United States versus McClain, interpreting the National Stolen Property Act. Under that decision, Mr. President, a U.S. citizen could be convicted of stealing cultural property if he or she imported such property knowing that the foreign government had declared ownership of all such property found within its borders and had not issued an export license. This would be true even if the U.S. citizen had paid for the artifact—and they had certainly not "stolen" it in any traditional understanding of the word—and despite the fact that the foreign country permitted its own citizens to own and trade such objects.

Is it proper, is it right, to permit American citizens and institutions to be subject to criminal prosecution by allowing declarations of foreign ownership to support the time-tested requirement that an owner have a real possessory interest in property before it can be considered stolen? Under the broad sweep of the McClain decision, the interpretation of the National Stolen Property Act now effectively turns on the meaning of foreign laws, largely unavailable in translation, and on legal concepts alien to American common law. U.S. Federal law should embrace American—not foreign—legal principles.

Moreover, the McClain decision is wholly inconsistent with the basic principle of the CIPA, that U.S. participation in efforts to control the international movement of cultural properties will be part of a concerted international effort. The McClain decision represents a unilateral, rather than multilateral, response to the genuine problem of the illegal pillage of cultural property.

I am particularly concerned that under the McClain decision, the executive branch is disregarding the policies and procedures of the CPIA. Hearings will afford an opportunity to explore a directive by the Customs Service largely adopting the McClain decision as well as recent bilateral agreements between the State Department and foreign countries, agreements which appear to be wholly inconsistent with congressional policies regarding CPIA.

I understand that the Customs' directive, particularly in conjunction with the State Department agreements, is producing a virtual embargo on pre-Columbian objects coming into the United States. This confounds all the procedures, requirements, and findings Congress established in the CPIA. It bypasses the Cultural Properties Advisory Committee now in place, authorized by Congress to provide the executive branch expert advice in this area. Custom's actions have supplanted the multinational effort authorized by the CPIA with a unilateral ban. In place of the CPIA mandate that our officials make independent determinations of what is in our own national best interests, they merely enforce a foreign nation's bald declaration of ownership. Finally, the effective across-the-board embargo of all pre-Columbian objects, under current Customs policy, is entirely inconsistent with Congress' declaration that any U.S. import ban respond to problems of pillage of specific sites or objects. These glaring contradictions—and their absence of any proper foundation in the McClain decision—should be fully explored in hearings on this bill.

Mr. President, as part of the negotiations that led to passage of the CPIA, all parties interested in the legislation agreed that the McClain decision should be overturned by statute. I considered that commitment an essential element of the understanding that led to uncontested passage of the act. Enactment of that law and repeal of McClain were a package.

The bill we are introducing today would reject the puzzling new judicial interpretation of the term "stolen." This bill, clarifying American law, goes hand in hand with, and is essential to, successful implementation of the CPIA. I urge its speedy passage, and I thank my good friend, Senator LAXALT, for agreeing to schedule early hearings.

I ask unanimous consent that the full text of the bill appear in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 605

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 2314 and 2315 of title 18, United States Code, are amended by adding at the end of each the following:

"This section shall not apply to any goods, wares, or merchandise which consists of archeological or ethnological materials taken from a foreign country where—

"(1) the claim of ownership is based only upon—

"(A) a declaration by the foreign country of national ownership of the material; or

"(B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership;

"(2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and

"(3) the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowledge of the illegal export and the defendant's knowledge of the claim of ownership described in clauses (1) (A) and (B)."

SEC. 2. Section 2311 of title 18, United States Code, is amended by adding at the end thereof the following paragraph:

"'Archeological or ethnological material' means any object of archeological or ethnological interest, including any fragment or part of any such object, which was first discovered within a foreign country and which is subject to export control by that foreign country. For purposes of this definition no object shall be considered to be an object of archeological interest unless such object is of cultural significance, is at least two hundred and fifty years old, and was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water, and no object shall be considered to be an object of ethnological interest unless such object is the product of a tribal or nonindustrial society and is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people."

Senator LAXALT. Senator Moynihan, welcome to the subcommittee. It is always a delight and pleasure. Will you please proceed?

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Thank you. Mr. Chairman, I congratulate you on a positively solomonic outline of the case before you. I have not seen it ever quite so succinctly and impartially stated, because there are two sides to this matter and I would hope to speak to them.

May I first, Mr. Chairman, introduce myself as a colleague—I obviously do not speak for the Committee on Finance, but I think I reflect an understanding which the committee had when we adopted the Cultural Properties Implementation Act in 1982. The legislation I bring before your committee was introduced by me and Mr. Dole, who was chairman of the Finance Committee in 1982.

And may I also say that I appear in some sense as chairman of the board of the Hirschhorn Museum and Sculpture Garden. I have been chairman since 1970, and we have had to deal with this subject at some considerable extent because parts of the collection are, for example, pre-Colombian sculpture from the Central American region.

Mr. Chairman, I have a statement of some detail which I would ask to be put in the record as if read in order that I might simply outline its main points to you and then respond to your questions.

Senator LAXALT. Without objection, and I hear none, it is so ordered.

Senator MOYNIHAN. Mr. Chairman, three enactments of various kinds are involved here. First of all, the 1970 Unesco Convention on Cultural Properties. This is, in my view and in the view of the Committee on Finance—which has jurisdiction because of the trade—an acceptable world rule, an acceptable treaty for governing commerce in cultural artifacts, and one that is necessary because there is simply a difference in the conditions of the countries where these artifacts are to be found and many of the countries where there are persons interested in owning, collecting and displaying them.

I mean, as between Guatemala and Switzerland, there is a certain inequality of circumstance which we recognize. There is an interest in preserving the rights of the Guatemalans to what is, after all, their national heritage.

There is an interest in maintaining the rights of Americans and other foreign nationals who are archeologists and students of ethnology in seeing that the natural sites are preserved and, if excavated, are done in an orderly manner, and that scholars have access.

We want to keep our scholars open to these matters, and that can be jeopardized by relations that are not friendly and are not working. And there is a general world interest in preserving things which otherwise could easily be vandalized and wrecked and ruined and lost.

The Finance Committee concerned itself with these issues for 5 years, at least, that I can state to, and we came to a judgment, Mr.

Chairman in adopting the Cultural Properties Implementation Act. We said we will abide by NATO Unesco Convention and enforce it in our courts and through our customs officials, but only when a sufficient number of countries in our same circumstances do so as well.

For us to do it unilaterally, alone, would have only the most minimal, if any, benefits to the countries that are meant to be protected by this convention. In a word, it would simply mean that the flow of these artifacts would go to Europe and Japan. Artifacts would not stop leaving the countries they are found in; they simply would not come here and American museums and American collectors and American dealers would be out of the arrangement. But the activities would go forward.

Let me analogize: It is a common principle of international treaties of all manner that they come into effect when a certain number of the original signatories have ratified. This is a very standard and a very sensible arrangement. Similarly, we said that we would only impose import restrictions when——

Senator LAXALT. Is there an objective standard to determine when a sufficient number of other countries have ratified?

Senator MOYNIHAN. Yes, sir; seven of nine. During the Finance Committee's discussions, we listed nine major importing countries, and concluded that when seven took action that would be sufficient. But not one has, sir; not one has, if you would like to know the reception in other parts of the world at this point. When seven of those nine named countries, ourselves included, agreed to take action, we would do so.

Senator LAXALT. Are those nine specific countries or just nine countries at random?

Senator MOYNIHAN. Oh, no, no; the nine countries that would be the largest importers. If you have seven of the nine, you have got the problem under control, and when that happens, we will do it.

In the meantime, we had a problem with the *McClain* decision in the Fifth Circuit Court of Appeals interpreting the National Stolen Property Act of 1943. The court ruled that an importer of cultural property could be criminally liable if the importer knew that a foreign government had declared ownership of all cultural properties within its borders and had not issued an export license.

Now, Mr. Chairman, this decision—well, I will not characterize it. I will simply state that a very large number of countries in Africa, Asia, and Central and South America, in a kind of pattern which is not unusual, have simply passed statutes saying all properties more than 200 years old belong to the state, or belong to the nation, and anybody in possession of them seeking to take them out of the country is stealing them and, ipso facto, is criminal.

Senator LAXALT. Do we have a comparable provision here?

Senator MOYNIHAN. No, sir.

Senator LAXALT. So it is wide open?

Senator MOYNIHAN. Every arrowhead you might find in New York or Nevada does not belong to the Federal Government. It belongs to the person who finds it, typically.

Senator LAXALT. But foreigners can come in and take an arrowhead and go elsewhere?

Senator MOYNIHAN. They can and they do, and they are welcome if they are interested in the subject.

And so with *McClain*, we have a situation where an American collector or dealer goes to a foreign country and purchases some pottery, say, from someone who, in that country, is in complete legal possession of that pottery; purchases the pottery in an open transaction freely entered into by someone who owns the pottery and may have it for sale on the street of the capital where the transaction takes place in a shop of a dealer; can bring it into this country and be seized at customs as a criminal or prosecuted here as a criminal.

They are not criminals. In no sense did our law ever intend them to be criminals. They did not act in any criminal way. It is possible to act in a criminal way; but we are talking here about normal transactions. S. 605 restores to the courts the time-tested rule that an owner must have a real possessory interest in an object before it can be considered stolen.

Senator LAXALT. Are these situations where the countries in question have not expropriated or nationalized, so to speak, the cultural property?

Senator MOYNIHAN. Well, they have nationalized it, so to speak, by simply passing a law saying anything under the ground belongs to us; we do not know where it is, but wherever it is, if you find it it is ours.

Senator LAXALT. How else would they do it?

Senator MOYNIHAN. That is the only way to do it, but the problem is that these are, first, not enforced; but, two——

Senator LAXALT. So the offense essentially is against the state, which has already passed that type of legislation.

Senator MOYNIHAN. It has passed that type of legislation in such a way as to prevent legal transactions, and the actual effect is this only inhibits and impedes the activities of honest persons.

There is a lot of smuggling; there is a lot of all kinds of things that you would not like to know, and attempts to address these problems are not bothered by S. 605.

Senator LAXALT. But if a given country has passed this kind of legislation, is that not a transgression of the law of that country?

Senator MOYNIHAN. Well, only to the degree that there is a real discovery by the individuals. We are not talking about people who go in and saw off the heads of carved animals on temples in jungles.

Senator LAXALT. I understand that.

Senator MOYNIHAN. We are talking about people who arrive in Mexico City and have a perfectly open transaction with a person legally doing business in Mexico City as a Mexican national, and bring that property they have legally purchased into the United States and suddenly have found themselves charged with possessing stolen goods.

We are giving effect to statutes of other countries—the kinds of statutes we would never ourselves stand for.

Senator LAXALT. That is a different situation, one in which the American citizen is buying the artifact from a Mexican art owner who purportedly has title.

Senator MOYNIHAN. Yes.

Senator LAXALT. Is that not a different situation than going out and making an archeological find and then taking that property? Is there a distinction here that I should not draw?

Senator MOYNIHAN. There is a valid distinction, in our view, sir. If it is illegal in that country, it is illegal in that country, period. But what is legal in that country—namely, the ownership by their nationals of properties which they put forward for sale in an open and above-board manner, and are purchased in an open and above-board manner—should not become stolen property when they return to the United States.

Senator LAXALT. So this legislation concerns property that has been legally acquired by the foreign national and then sold to American citizens.

Senator MOYNIHAN. Yes, exactly.

Senator LAXALT. Is that what we are talking about?

Senator MOYNIHAN. Exactly.

If I may say, Mr. Chairman, this issue was before us in the Finance Committee and we clearly wished to adopt this provision as part of the Cultural Property Implementation Act. It was clearly part of our general understanding of how we would deal with this whole subject.

But we were the Finance Committee, not the Judiciary Committee, and it was clear to us on the advice of counsel that we could not adopt this section. This is the missing section from the 1982 legislation, which was a compromise and an agreement reached between the different parties at interest—the museums, the dealers, the collectors, the Department of State, the Customs Service.

We had a general understanding; it is coming apart a bit, I admit, but this provision was to be part of it. It is just that it was not within our jurisdiction.

Senator LAXALT. Was a sequential referral to this committee considered at that time?

Senator MOYNIHAN. We immediately referred this bill to this committee, but you were not able to hold hearings in the last Congress. This committee tried to get to it, but could not.

Senator LAXALT. I see.

Senator MOYNIHAN. That is about what I have to say, sir. I think you will get much more expert testimony, but I speak to you with a very considerable amount of involvement in this both from the point of view of the museum and from—I was Ambassador to India and was on the other side of this. A great deal of that ethnographic work comes out of that part of the world.

We are talking about American collectors and dealers, and ultimately museums, who have legitimate rights here. We stand by this treaty, but it would not be fair to our nationals to leave us the only country in the world which has to abide by the treaty and then find our own people subject to criminal prosecution for blameless acts. I mean, that is just too much of a self-inflicted wound.

Senator LAXALT. Thank you, Senator, for an excellent presentation.

May the record indicate the presence of the chairman of this committee, Senator Thurmond, and Senator Mathias, my colleague.

Senator Moynihan has just presented his statement detailing the history of this piece of legislation and indicating it emanated from

1982 legislation out of the Finance Committee. The committee discovered later that they needed additional legislation to overturn the *McClain* decision; this legislation is the subject of this hearing.

Does either of my colleagues have any questions that he wishes to ask this very busy Senator before he departs?

The CHAIRMAN. I have a couple of questions when we have the time.

Senator LAXALT. Surely.

The CHAIRMAN. Now?

Senator LAXALT. Why do you not proceed, Mr. Chairman? We would not have it otherwise; we would not dare. [Laughter.]

The CHAIRMAN. I ask unanimous consent that my opening statement be inserted.

Senator LAXALT. Without objection, so ordered.

The CHAIRMAN. I have a couple of questions. Senator Moynihan, do you feel that further legal challenges to the *McClain* decision may resolve the problems which this legislation intended to remedy?

Senator MOYNIHAN. No, Mr. Chairman. We feel that at this point the legislation is in order. It is the only way to clear the matter up. I bring the bill before you for myself and Mr. Dole, and without presuming beyond my authority here, I think I speak for the Finance Committee in the sense that this is the one part we need to make our 1982 legislation, the Cultural Property Implementation Act, a complete one.

Otherwise, we have American nationals being dealt with as criminals because they have violated some law of some other country, which laws we find very questionable.

The CHAIRMAN. Senator Moynihan, do you feel that criminal penalties play an important role in the restriction of illegal trade of protected art objects? And if so, will the criminal provisions of the National Stolen Property Act continue as a deterrent in your amendment if it is approved?

Senator MOYNIHAN. Mr. Chairman, this only deters persons who are not criminals and who would not engage in a criminal act. It does not dissuade a very large illegal traffic in these properties, which we do know exists.

The problem here is that we are defining as "stolen," properties which are in no sense stolen in the sense of our common law understanding of the word. There is no possessory interest at all.

We are penalizing open transactions by reputable persons and not in any way inhibiting criminal activities.

The CHAIRMAN. As I understand it, the purpose of your legislation is to limit the *McClain* decision and restrict the application of existing Federal criminal provisions.

Senator MOYNIHAN. That is right, sir.

The CHAIRMAN. Thank you very much.

Senator LAXALT. Senator Mathias.

Senator MATHIAS. Senator Moynihan, I share your interest in this legislation because there is obviously some uncertainty in the law. This creates problems for museums, for collectors, and for those in charge of national treasures and national heritage in various parts of the world.

I suppose from an archeologist's point of view, of course, the best of all possible worlds is to have everything situated right on the site where it is discovered.

Senator MOYNIHAN. In situ.

Senator MATHIAS. In situ. But, in fact, because of grave robbers and other kinds of robbers, and because of people who just are interested, who just want to possess interesting and artistic objects, things do not remain in situ.

There is a kind of tension between archeologists, who want everything in situ, and museum directors, collectors, and educators. Do you see that this bill will reduce that tension?

Senator MOYNIHAN. Yes, I do, in the following way. If you will just take a moment to hear me out because I know of your interest in this matter, we start with the Unesco Convention. The Committee on Finance, and the Senate, and the Congress, and the President have basically said that is a good convention; it is necessary.

The relations between the countries where many of these things are found and the countries where they are collected is not an equal relationship. As between France and Guatemala, there is an inequality of condition.

Now, we, the United States, in the first place have said we will abide by that convention. We will enforce it when seven of the nine major importing countries in the world do so with us. I mean, there is no point in us being the only one that does it. You know, it would have no effect whatever on the world commerce.

We want others to do so. We have set an example.

Senator MATHIAS. In a unilateral embargo, if there are plenty of other markets, it does not matter.

Senator MOYNIHAN. Right. We are saying we would like the countries where this is a problem to be prompting those other importing countries as well, saying, you know, the United States has said it will enforce the convention just as soon as you do and you do and you do. Now, why do you not?

We have come forward; we believe in this. Our museums already maintain the Smithsonian standards. The Smithsonian Institution has established rules on what you can acquire, and we have followed them meticulously in this country.

You know, I think we are to be admired in this regard. It is easy to say one is to be admired, but I think that if you look at the other countries in the world, we are setting the standard.

Why should we, in the meantime, have American citizens dealt with as criminals who have done nothing criminal?

Senator MATHIAS. One other question. In your previous incarnation, you may have been aware of a famous case at the Boston Museum of Fine Arts. The purchase of a certain picture proved to be a disaster and caused a great scandal in the art world.

Senator MOYNIHAN. Yes.

Senator MATHIAS. I am wondering whether this bill would change the kind of situation which existed there. Would it protect bona fide purchasers?

Senator MOYNIHAN. Yes, and would in no way protect smuggling or other forms of illegal activity.

Senator MATHIAS. If there was knowledge on the part of the museum or of its personnel, then that situation would not be changed in any way?

Senator MOYNIHAN. It would not be changed in any way. May I say that since the Smithsonian standards have been promulgated, that particular situation does not arise. American museums are meticulous in this matter, as none other in the world. We have set world standards in this matter and you would be proud of it, and I am sure you are.

Senator MATHIAS. I suppose the most important question I could ask you is whether you know if Mrs. Moynihan supports this legislation? [Laughter.]

Senator MOYNIHAN. I know, but I think it is wise not to say. [Laughter.]

Senator MATHIAS. I understand and accept that as a full and complete answer.

Thank you very much.

Senator MOYNIHAN. Thank you. Thank you, Mr. Chairman.

Senator LAXALT. Thank you very kindly, Senator.

[Prepared statement follows:]

Testimony of

SENATOR DANIEL PATRICK MOYNIHAN

on S. 605

Before The

Senate Judiciary Committee's

Criminal Law Subcommittee

Mr. Chairman, I want to thank you for scheduling this hearing and providing me the opportunity to testify on behalf of S. 605, which the Majority Leader and I introduced, on March 6.

Our legislation would amend the National Stolen Property Act (NSPA), 18 U.S.C. § 2314. Among other things, the NSPA prohibits the transportation of any goods in foreign commerce with the knowledge that such goods have been "stolen".

In 1977 the Fifth Circuit Court of Appeals ruled, in the case United States v. McClain, that an importer of cultural property -- in that case, an importer of pre-Columbian terra cotta figures, pottery, beads and stucco pieces from Mexico -- was criminally liable under the NSPA. The court ruled that property should be considered "stolen" under the terms of the NSPA, if an importer knew that a foreign government had declared itself the owner of all cultural properties within its border and had not issued an export license in the particular instance. The court held such was sufficient to violate the NSPA, even if an importer had purchased objects that persons in the foreign country could lawfully collect and trade. Which is to say, the Act could be violated even though the objects had not been "stolen" in any traditional understanding of the word.

S. 605 would reverse the interpretation of the NSPA set forth in the McClain decision. There are three reasons why it would be proper to do so.

First, it would make the NSPA consistent with the comprehensive national policy regarding the importation of cultural property explicitly set forth in the 1982 Cultural Property Implementation Act (CPIA).

Second, it would require the Executive Branch to adhere to the principles and procedures set forth in the CPIA regarding

the U.S. response to legitimate problems of pillage of archeological or ethnological materials abroad. The Customs Service and the State Department have ignored the CPIA and taken actions that have resulted in a virtual unilateral embargo on the importation of all pre-Columbian objects -- relying on the McClain decision for doing so.

Third, it would assure that American citizens are not subject to criminal prosecution on the basis of foreign declarations of law, without regard to whether the property was "stolen" in the common law sense of taking it from someone with a real possessory interest in the property.

Mr. Chairman, it may be helpful if I could briefly explain the origins of this legislation.

For more than a decade, the Senate Finance Committee worked on legislation to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. In the waning days of the 97th Congress, the Finance Committee obtained a compromise agreement from the many government and private interests, including the State Department, Customs Service, Justice Department, museum officials, archeologists and art dealers. As reported by the Finance Committee and passed by the Congress, the CPIA sets forth a clear and comprehensive statement of national policy concerning the importation of cultural property.

Basic to the Act is the principle that the U.S. will act to bar the importation of particular cultural properties but -- except in narrowly defined emergencies -- only as part of a concerted international response to a specific, severe problem of pillage. The Act contains discriminating standards and requires precise determinations that in a specific case there exists the threat of a severe problem of pillage. The CPIA also created a Cultural Property Advisory Committee -- now in place and functioning -- to advise the President on appropriate situations for imposing import restrictions.

One part of the compromise which produced unanimous support for the Act was a clear understanding that the CPIA would

establish the definitive national policy regarding the importation of archeological and ethnological materials, and that any other provisions of law inconsistent with this policy would be brought into accord. During consideration of the CPIA, it became apparent that the Finance Committee did not have jurisdiction to correct one such inconsistent provision: the definition of stolen property under the NSPA and its application to the importation of cultural properties. Therefore, as part of the compromise that led to passage of the CPIA, the concerned parties agreed to support separate legislation to overturn the McClain decision's interpretation of the NSPA. I considered that agreement an essential element of the understanding that led to uncontested passage of the CPIA.

Legislation similar to S. 605 was introduced late in the 97th Congress, but insufficient time remained to take up the bill (S. 2963). Legislation was introduced again in the 98th Congress (S. 1559), but for a variety of reasons was not considered. In March, Senator Dole and I introduced S. 605. S. 605 closely resembles the earlier bills, incorporating some modest technical modifications to better comport with the style of the NSPA. The time has come to move forward with this legislation; the need is now more pressing than ever.

The McClain decision remains wholly inconsistent with the basic principle of the CPIA. Under the CPIA, the U.S. will impose import restrictions only as part of a truly multinational effort, following the determination that such is needed to address a specific and severe problem of pillage. Under the NSPA as interpreted by the McClain court, however, the U.S. imposes import restrictions -- in the form of U.S. criminal sanctions against the importer -- whenever a foreign country declares itself the owner of all cultural properties within its borders and refuses to issue an export license.

This inconsistency, Mr. Chairman, has had very real consequences. As I noted earlier, certain Departments of the Executive Branch have relied on the McClain decision -- notwithstanding passage of the CPIA -- to impose a virtual

embargo on all pre-Columbian archeological and ethnological objects coming into the U.S.

Because McClain interprets U.S. criminal laws so as to require the United States to recognize foreign countries' bald assertions of national ownership, the State Department has continued to negotiate, execute and implement bilateral agreements which obligate the United States to ban from entry into this country cultural property from the other country, if it claims national ownership -- despite the clear intent of the CPIA that such claims alone not determine our import policy. There are currently three such agreements in effect: One with Mexico, concluded in 1970; another with Peru, concluded in 1981. Most disturbing, however, is an agreement with Guatemala entered into within the last year. Two years after enactment of the CPIA, the State Department has simply disregarded the standards, criteria and requirements of that Act.

Further, the Customs Service -- relying on these bilateral agreements and the McClain decision -- has promulgated enforcement guidelines that effectively have stopped the importation of pre-Columbian artifacts from all Central and South American countries. Importers can be prosecuted, including those who buy artifacts from private collectors, and the objects returned or detained pending completion of legal proceedings to determine whether there is a sufficient claim of national ownership. In short, the personal and commercial risks have become so great that established art dealers are no longer willing to import such items. This, in turn, has injured American museums, collectors, and scholars. (Indeed, so zealous has Customs become, that it recently indicated it would refuse to permit a gallery in New York to import -- for exhibition purposes only -- pre-Columbian Mexican objects that had been held in a private collection in Paris since 1929!)

May I also mention that this McClain-inspired policy will not help preserve the cultural patrimony of the exporting countries. It simply means that artifacts are being exported, and will continue to be, to countries other then the U.S., so that dealers and collectors there may trade in them or keep

them. According to those with the most thorough knowledge of the international market in pre-Columbian art, the principal beneficiaries are not the people of Mexico or Peru, but rather wealthy (and clandestine) collectors in such places as Switzerland, France and Japan.

These are precisely the results that Congress hoped to avoid by passing the CPIA. The CPIA explicitly adopts the view that practicing self-denial, without similar action by other importing countries, will not help preserve the cultural patrimony of other countries.

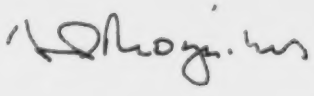
Finally, Mr. Chairman, should we not protect our citizens from criminal prosecution based on broad declarations of foreign ownership -- often unavailable in English translation? Is it right, Mr. Chairman, to permit American institutions and citizens to be subject to criminal prosecution by allowing declarations of foreign government to replace the time-tested requirement that an owner have a real possessory interest in an object before it can be considered stolen? The U.S. Federal law should embrace American -- not foreign -- legal principles.

The legislation that Senator Dole and I have introduced would not exempt imported cultural property from the scope of the National Stolen Property Act. Under the NSPA as amended by S. 605, the wrongful taking of any artifacts from the possession of any public or private party would still give rise to criminal liability, so long as that party's possession of the object or the site from which it was removed was consistent with our common law and statutory concepts. Similarly, anyone taking and importing an artifact from a national museum or archeological dig on public lands, or in violation of a government license permitting that object to be held in private hands, could still be prosecuted under the NSPA.

Furthermore, S. 605 would in no way affect a foreign country's enforcement of its own laws concerning ownership of cultural property. It is directed exclusively to the issue of whether we have to enforce here -- in a criminal context -- foreign legal claims that offend our jurisprudence and national policy in this area.

Mr. Chairman, what S. 605 would do is ensure that import restrictions would be imposed pursuant only to the explict policy, standards and procedures set forth in the CPIA. It also would ensure that our criminal law is not used to impose liabilities on American citizens, based on claims of ownership that are foreign to our legal system.

Thank you, Mr. Chairman.



Senator MATHIAS. Mr. Chairman, I have an opening statement that I would like to submit for the record.

Senator LAXALT. All right. Without objection, it is so ordered.

We had planned to have Professor Bator here, but he apparently has not yet arrived and we will accommodate him when he does arrive. Next we will have a panel--oh, he just arrived?

Professor, extraordinarily good timing; you are up. [Laughter.]

Welcome to the committee. Will you kindly be seated?

Our next witness is Prof. Paul Bator, who is professor of law at the Harvard Law School. He is the former Deputy Solicitor General and has written a seminal article concerning international trade in art.

We welcome you, Professor, and look forward to hearing your views on this noncontroversial issue.

STATEMENT OF PAUL M. BATOR, BURCE BROMLEY PROFESSOR OF LAW, HARVARD LAW SCHOOL

Professor BATOR. Mr. Chairman and members of the committee, I thank you for allowing me to come and testify. I apologize for being late.

Senator LAXALT. Professor, if you choose to summarize, we would not be unhappy and we would cause your full statement to be duly filed.

Professor BATOR. I planned to do so. I have a written statement that I have filed.

My name is Paul Bator. I am professor of law at Harvard and my experience in this field goes back some 15 years. I have been involved at various points as a legal expert on issues of international trade in art.

I would like very briefly to comment on the draft before the committee which deals with the *McClain* case, and also to address a few problems regarding statutes of limitations, which is another issue in this field.

The committee has before it a bill, S. 605, to reverse the decision of the Court of Appeals in the Fifth Circuit on *McClain*. *McClain* is a complicated case and I will not go into its technicalities.

The heart of the decision and the difficulty that it creates is that it says that if a foreign country adopts a general, blanket vesting statute which says that all antiquities of a certain kind belong to the State—then, thereafter, simply on the basis of such a vesting statute, an illegal exportation from that country can constitute theft within the meaning of our criminal legislation, the National Stolen Property Act.

The case erodes a very important general and classical distinction in our law, between illegally exported property on the one hand and stolen property on the other.

Senator LAXALT. What is the fundamental distinction? Would it not be a crime in either case?

Professor BATOR. It might be a crime under the law of the foreign country, Senator Laxalt, but the general position of the American law has been that although it is illegal under our law to import stolen property, it is not illegal to import something simply because it has been unlawfully exported.

Senator LAXALT. So when you are talking about illegal exports, you are thinking in terms of the foreign country?

Professor BATOR. I am talking about the export laws of a foreign country.

Senator LAXALT. All right.

Professor BATOR. If the owner of an artifact smuggles something out of a foreign country, there may be no theft within the meaning of our law involved, and the question is whether we should enforce the export regulations of the foreign country.

Senator LAXALT. And what are the extradition implications?

Professor BATOR. I do not know, Senator.

Senator LAXALT. As a practical matter, is that a problem?

Professor BATOR. As a practical matter, I doubt if that is a problem.

Senator LAXALT. All right.

Professor BATOR. What *McClain* does is to expand in a rather artificial way American criminal legislation in order to deal with a very special problem, which is this problem of the importation and the possession in this country of artifacts of uncertain and unknown origin.

Now, there is American law specifically aimed at that problem. There is a Unesco Convention, and the Congress of the United States, a few years ago passed a statute implementing that convention. That legislation, in a very particularized and specific and definite way, deals with how American law should respond to the problem of the illegal export of archeological artifacts.

My general position is that the Unesco legislation, which deals with the specific problem of the looting of archeological sites, and which represents a very elaborately crafted compromise, is the law that should be used to deal with this problem. General American criminal legislation should not be artificially manipulated in order to deal with the problem of the possession of artifacts of wholly uncertain and unknown origin.

That is why I have, ever since it was decided, been critical of the *McClain* case, and why I agree with the general thrust of the proposed legislation, which is to return the National Stolen Property Act statute to its intended framework—that is, cases of real theft, where it is shown and proved that somebody took something from somebody else's ownership, and it is a real ownership and not simply one of these abstract vesting statutes saying that everything belongs to the State.

Another problem has surfaced: the need for a reasonable statute of limitations in order to protect bonafide purchasers of artifacts whose possession may turn out to be vulnerable.

The time during which bonafide purchasers are exposed to liability should be limited in a reasonable way, and that is why I would very much hope that the committee would draft and that the Senate and the House would pass reasonable repose legislation.

Senator LAXALT. Do you have a time period in mind?

Professor BATOR. I do not have anything specific in mind. There are analogies which can be used. For instance, foreign countries should not have a longer period to seize contraband articles than the United States. That would be a helpful analogy.

I am delighted to answer any questions.

Senator LAXALT. Senator Thurmond

The CHAIRMAN. Thank you, Mr. Chairman.

Professor, do you feel the decision by the Fifth Circuit Court of Appeals was wrongfully decided, and if so, is further litigation on this matter desirable?

Professor BATOR. I would hope that there would not be further litigation if the Congress can cure the problem.

May I add one other word, Senator Laxalt, going to the history of this whole field? When the Congress passed the implementing legislation, it was the product of a very carefully and elaborately structured compromise between the various interest groups—dealer groups, museum groups, archeological groups, administration people.

It was specifically the understanding at that time that if the Unesco implementing legislation is passed, it would be a part of the package that there would be some cutting back on the expansive *McClain* theory for using the National Stolen Property Act against some of the same activities.

There was an understanding and a good-faith pledge that was part of the compromise for enacting the Unesco statute.

The CHAIRMAN. I guess there are two sides to this matter, like all matters, nearly. For instance, if you have a country here—say Peru or any country that you want to name—and they have some paintings there that are several hundred years old that are more or less a part of that country's culture, and so forth.

Then some rich Americans come along and offer such huge prices for them that the owners decide to sell them. Now, if the owners do sell those for these big amounts that they could obtain for these old pieces of art, then that country is deprived of some of its historical art treasures, is it not?

Professor BATOR. Yes, sir.

Senator LAXALT. That is an important policy problem, is it not?

Professor BATOR. Yes. If those pieces are sold to an American, that would be a——

The CHAIRMAN. That would deprive that country of some of the culture and art that has been worked on and preserved throughout several hundred years. Then, all of a sudden, it is sold to people who are so wealthy, they are able to buy it and bring it here and, in turn, sell it to others at a profit.

On the other hand, of course, we always operate on the theory of private enterprise and anyone who wants to buy and sell has a right to do it. I was just wondering, in your opinion, are a large number of legitimate art dealers and collectors in this country unfairly subjected to possible criminal prosecution under the existing law?

Professor BATOR. My view is that under *McClain*, they are threatened, and I think unfairly threatened with too wide a criminal liability. But I would like to add this, Senator Thurmond: I think that there are strong interests suggesting that some very important artistic treasures not leave the foreign country.

And I think that it is good policy for American law to aid foreign countries with respect to keeping some things—not all their things, but some things. And that is just what the Unesco implementing legislation in its compromise does; it provides a mechanism for creating American import restrictions with respect to certain categories of art that might be labeled an endangered species of art. That is the compromise that is in the Unesco legislation.

Senator LAXALT. Would the Senator yield for one moment?

The CHAIRMAN. Yes, sir.

Senator LAXALT. Since *McClain*, have there been any prosecutions?

Professor BATOR. Senator, I am not certain.

Senator LAXALT. Are there any investigations?

Professor BATOR. There was a case involving some art from Peru where there was talk about prosecution or litigation.

Senator LAXALT. Who was handling it, Justice?

Professor BATOR. It was the Justice Department. I think the Government of Peru was also involved in this case.

Senator LAXALT. But to your knowledge, have there been any indictments?

Professor BATOR. Not to my knowledge, but I have been a little bit out of this area.

Senator LAXALT. We are going to have a witness from Justice who, I am sure, can tell us that.

Professor BATOR. The *McClain* case, if I may add this, does create a theory or a basis for civil liability as well as criminal liability.

Senator LAXALT. Is that a new cause of action?

Professor BATOR. That would be based on *McClain's* theory about what is ownership, so that if a State enacts one of these statutes that simply says every antiquity is the property of the State, that will be recognized by American law.

Senator MATHIAS. Under *McClain*?

Professor BATOR. Under *McClain*.

Senator LAXALT. Yes.

The CHAIRMAN. We do not want to subject our art dealers and collectors to these criminal penalties. On the other hand, maybe

some provision could be worked out if a painting or a piece of art, say, is over 200 years old. Then maybe the country in which it is located would have to approve it. Anything under that, maybe they could sell it.

I think there might be an area of compromise here that would protect the treasures of other countries and not tempt the owners of art in that country just to sell them for a few dollars.

At the same time, we do not want to subject our art people here to criminal penalties. I think this matter probably ought to be clarified and some fair and reasonable decision reached on it.

How do you feel about that?

Professor BATOR. I think it is important to clarify the matter. I think that the American criminal law is appropriately used where there is real proof that a known monument has been plundered, dismembered, and shipped to this country. That was the *Hollingshead* case in the Ninth Circuit, and I do not think there is much controversy about it.

The trouble with *McClain* is nobody knew whether this was stolen in any real sense—when, where, and who, took it. There was no proof of an actual theft.

The CHAIRMAN. Thank you very much.

Senator LAXALT. Senator Mathias?

Senator MATHIAS. Professor Bator, the science of archeology has changed enormously in recent years. When Pompeii and Herculaneum were being opened up, it was just a question of digging to find the artifacts. Today, people can read each layer of earth as it is uncovered. They can gain tremendous knowledge about the past from both the method of excavation and the results of the excavation.

So there is an interest in not encouraging the kind of mindless digging that has gone on in the past. The purpose of this legislation would be to protect the bona fide purchaser of archeological or cultural property, and in that light it would help to preserve the legal trade.

But would it also have the effect of giving some comfort or encouragement to illegal excavators or looters, such as the very defendants in the *McClain* case?

Professor BATOR. The defendants in the *McClain* case were not very savory characters. That is true. If you look only at the specific case retroactively, you can say, why not prosecute unsavory characters who are in the smuggling business?

The problem, Senator Mathias, here is really a disagreement about means more than ends. I do agree with you that the looting of these sites is a terrible tragedy. But the indiscriminate use of either import restrictions or criminal liabilities in American law encourages an overly broad regulatory regime in some of these countries, a regime that is ineffective, overreaching, and inefficient. Such a scheme distracts attention from the real problem, which is the effective physical maintenance of these things at home.

This is a field in which simple, quick cures will not do the trick. I think that the compromise embedded in the Unesco implementing legislation, which was directed at these problems, crafts a reasonable and fair attempt to deal with the problem of looting, while

being reasonably protective of American bona fide interests. So I think it deserves a try. There has been a cultural committee created under that statute which will advise the President on when and where import restrictions should be imposed. We ought to give that statute a try.

Senator MATHIAS. One of the effects of the *McClain* decision, as I understand it, is a virtual embargo on entry of pre-Colombian objects by the Customs Service. I wonder if you are aware of the effect of this embargo both on the legal market and on the illegal market for these objects.

Professor BATOR. Senator Mathias, I am sorry; I am not. I have been in the Justice Department myself for almost 2 years and have not followed it carefully. I do remind you, Senator Mathias, that there is another specific American statute dealing with monumental pre-Colombian art and sculpture, a specific and narrow statute designed to deal with one specific, narrow problem. The purpose of that was to embargo dismantled monumental pre-Colombian pieces from coming into the country. I do agree with that legislation, too.

Senator MATHIAS. In your statement you say that the Unesco Convention and its implementing legislation established a regime of selective import controls on works of art. These controls apply only prospectively. The legislative process has, to date, left the statute of limitations problems unresolved .

I wonder if you are familiar with a bill which has been introduced from time to time, both in the House and in the Senate, which is often called the Cultural Property Repose Act?

Professor BATOR. I do not know the bill, Senator Mathias.

Senator MATHIAS. What it does is set up a series of statutory limitations. For example, it would apply to property which has been held in the United States for 5 years prior to the date of the enactment of this chapter if, on the date of enactment, the archeological or ethnological material has been held in the United States for 5 years or has been held in the United States for 2 years irrespective of the date of enactment if, for that period, it has been on exhibit; or when held in the United States for 5 years irrespective of the date of enactment if, for 3 years, the fact of such holding was made public through public exhibition or publication; or for 10 years, irrespective of the date of enactment, unless the foreign state establishes that the U.S. holder acquired the item with actual knowledge that it had been removed from the possession of the country of origin in violation of the law of the country of origin, and so forth—in other words, a schedule of limitations for different situations.

Professor BATOR. I am enthusiastically in favor of any bill that creates reasonable periods of repose for American bona fide purchasers.

Senator MATHIAS. If we put a copy of this draft in your hands, would it be possible for you to give us a very brief comment on it?

Professor BATOR. May I do so in writing?

Senator MATHIAS. In writing for the record, Mr. Chairman.

Professor BATOR. I would be delighted.

Senator LAXALT. Excuse me. I was interrupted for just a moment. Senator Mathias, you made a request?

Senator MATHIAS. That we may submit a copy of the Cultural Property Repose Act to Professor Bator and get his comment for the record.

Senator LAXALT. We would appreciate that, if you will, Professor.

Professor BATOR. In the statement that I gave the committee this morning, Senator Mathias, I do make some general suggestions about the problem of repose in the second half of my statement. I will add to that when I look at the specific bill.

Senator MATHIAS. Just one further question. You have referred to the general situation in which a foreign government applies some blanket limitations on archeological or cultural property.

Would that include the common law provision that all treasure trove is the property of the crown, or is that a more fundamental right?

Professor BATOR. It may, Senator Mathias, although the legal system of some of these countries may have no common law tradition of that sort at all. In fact, one problem in this field is that the law of many of the countries from which some of these things come is extremely mysterious.

When American courts try to deal with who owns what with respect to this material, trying to give American judges and juries an understanding of the translations of these very mysterious foreign provisions can create enormous confusion in the courtroom.

In *McClain,* experts testified at length on the meaning of Mexican legislation, and it was very difficult testimony.

Senator MATHIAS. Mr. Chairman, I have many more questions, but I will restrain myself. Thank you.

Senator LAXALT. Thank you very much, Senator Mathias, and thank you, Professor. You have been most helpful.

Professor BATOR. I thank the committee very much for listening to me.

Senator LAXALT. There may be additional questions submitted to you. If you would be kind enough, if they are submitted, to return them to the subcommittee for the edification of our colleagues and ourselves?

Professor BATOR. Thank you.

Senator LAXALT. Thank you.

[Prepared statement follows:]

STATEMENT OF PAUL M. BATOR

Senate Judiciary Committee
Subcommittee on Criminal Law

May 23, 1985

My name is Paul M. Bator. I am Bruce Bromley Professor of Law at Harvard University. I thank the Subcommittee and Chairman Laxalt for your invitation to testify this morning about proposed legislation concerning the international trade in art and archeological artifacts. I will address two subjects: problems created by the decision in United States v. McClain; and the need for a reasonable statute of limitations on replevin actions by foreign countries seeking repatriation of art or artifacts that are now in this country.

First, I would like to summarize my experience in this area. I have been involved for more than 17 years, in a variety of contexts, with problems surrounding the international trade in art and archeological objects. I was Reporter for the Panel on the International Trade in National Art Treasures of the American Society of International Law. I served as a member of the U.S. Delegation to the UNESCO Special Committee that negotiated and drafted the UNESCO Convention On The Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and I was active in the negotiations that led to the enactment of the UNESCO implementing legislation, Public Law 97-446. I am the author of essays and law review articles in this area, and in 1983 my book, called The International Trade in Art, was published by the University of Chicago Press.

A.

The Committee has before it a bill, S 605, to reverse the decision of the U.S. Court of Appeals for the Fifth Circuit in United States v. McClain, 545 F.2d 988, 593 F.2d 658 (5th Cir. 1979). I would like to comment briefly on McClain and the general principles that I believe should guide legislation in this area.

The McClain case has a complicated procedural history, including two trials and appeals, and I will not discuss its details this morning. The heart of the decision is its holding that, if a country adopts a blanket or umbrella vesting statute declaring that all archeological objects of a certain sort are "owned" by the state (whether or not they are in any way reduced to possession), thereafter an illegal export of such an object from that country can constitute "theft," and its importation into or possession in the United States may be prosecuted under the National Stolen Property Act ("NSPA"), even if there is no evidence of when, where or how the object came into the defendant's possession. The case erodes the important distinction our law has always made between "stolen" and "illegally exported" antiquities. Illegal export, rather than some previous "taking," is the crucial event; as the court said, "exportation constitutes a sufficient act of conversion to be deemed a theft" (545 F.2d at 1003 n. 33). This gives dramatic weight to foreign nations' umbrella vesting statutes: illegal export, after the adoption of such a statute, suddenly becomes "theft". By waving a magic wand and promulgating a metaphysical declaration of ownership, a foreign country, without affecting any real changes at home, can thus invoke the criminal legislation of the United States to help enforce that country's export rules. Further, since the prosecution does not have to make any showing as to whether and when the goods were unlawfully taken in the first place, the illegal export of artifacts may constitute theft even if they were obtained by a defendant prior to adoption of the umbrella "vesting" statute. Under McClain, from a timing viewpoint, it is illegal export, and not some previous act of unlawful appropriation, that constitutes the critical event.

This is not desirable criminal law. Criminal liability under the NSPA is appropriate in clear and eggregious cases: for example, where a known national monument is dismembered and smuggled out of a country, or where there is a specific showing that antiquities were unlawfully appropriated and that the defendant knew that this had occurred. But if all that is shown is that the defendant illegally exported artifacts after a state enacted an umbrella vesting statute, and there is no showing as to where, when and how these objects were found and how they came into the possession of the defendant, using the NSPA seems to me inappropriate and undesirable even if the defendant knew of the existence of the statute.

To make matters worse, the extension of the McClain principle to civil cases is a real threat. Using a foreign country's umbrella vesting statute as a basis for disturbing the possession of antiquities that are in the hands of bona fide purchasers in the United States seems to me a most dubious way to deal with the problem of the trade in antiquities. The problem is compounded by the complexities (and potential unfairness) of having to adjudicate questions of title entirely by resort to translations of complicated and often mysterious foreign antiquities legislation.

Indiscriminate and frequent of the McClain principle will inevitably encourage regulatory regimes that are over-inclusive and unduly rigid. Values that favor international trade in art will, as a consequence, be overlooked. Many illegally exported antiquities were unearthed years ago. Many of these are substantially unwanted at home and unnecessary to preserving the national patrimony. The fact that they may nominally be "owned" by the State does not change the substantive situation. They should be freely exportable and, even if they are not, inport barriers should not be erected against them. Nor should we give other nations a blank check to repatriate whatever they please by allowing them to manipulate our conceptions of what are "stolen" goods.

The problem of looting of sites and the trade in antiquities of unknown provenance should be attacked by regulatory measures that are designed to deal with that problem, so that account can be taken of the multifarious interests involved. We should not attempt to regulate the international trade in art treasures through the device of placing heavy expansive pressure on the concept of what is "stolen" property. The "stolen property" category should be reserved for clear and eggregious cases; and we should face the problem of the trade in antiquities of unknown origin and uncertain ownership directly and explicitly by regulations operating independently of the general law of theft. That is why these matters should today be governed not by the NSPA but by the UNESCO Convention and the United States' implementing legislation in Public Law 97-446.

B.

The UNESCO Convention and its implementing legislation establish a regime of selective import controls on works of art. These controls apply only prospectively. The legislative process has to date left unresolved the statute of limitations problem. It is another facet of the problem that foreign blanket patrimony statutes create, and Congress should address it along with McClain.

Statutes of limitations applicable to foreing sovereigns' replevin actions vary from state to state. This may itself be sufficient reason for Congress to act. The right of an American bona fide purchaser of antiquities to retain his property against a claim by a foreign sovereign should not be a function of his state of residence. But the most serious problem is that in some jurisdictions repose statutes do not begin to run until a demand by the foreign country has been refused by the U.S. holder. In such jurisdictions, no burden of showing just when or how the "theft" occurred rests with a plaintiff, who can therefore sleep on its rights with impunity.

Several considerations should guide legislation in this area. First, it seems clear to me that in general the law should not attempt to undo and remake the past. An attempt today to untangle history would be doomed to failure; we cannot reallocate art among nations on the basis of retroactive judgments as to where objects "rightly" belong. Similarly, possession here of works of art whose import and acquisition were legal when accomplished should not be disturbed. A statute of limitations should therefor aim to put in repose all antiquities that have come into this country prior to the date of enactment and that are owned by bona fide purchasers.

Second, for items designated under the UNESCO Convention, it would be reasonable to set the same limitation periods as those that are applicable to seizure actions by the United States under the implementing legislation in Public Law 97-446. These are relatively long periods of time which are justified by the nature of the patrimony designated under the UNESCO regime.

Shorter periods, designed to afford foreign sovereigns adequate notice of the holding in this country, would be in order with respect to artifacts whose import falls outside of the UNESCO regime.

Thank you again for the opportunity to testify this morning. I would be pleased to answer any questions.

Senator LAXALT. We will now proceed with our first panel. I want to welcome this panel of administration witnesses. We have James Knapp, Deputy Assistant Attorney General in the Criminal Division of the Justice Department. Welcome, Mr. Knapp.

Mr. KNAPP. Thank you, Senator.

Senator LAXALT. Ely Maurer, who is Assistant Legal Advisor for Educational, Cultural and Public Affairs at State; and Richard Abbey, Chief Counsel for Customs.

Will you kindly proceed in the order designated? After each of you presents your various statements, I am sure that the members of the subcommittee will have some questions.

STATEMENT OF A PANEL CONSISTING OF: JAMES I.K. KNAPP, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE; ELY MAURER, ASSISTANT LEGAL ADVISER, EDUCATIONAL, CULTURAL AND PUBLIC AFFAIRS, DEPARTMENT OF STATE, ACCOMPANIED BY FRANCES ARMSTRONG, LATIN AMERICAN SECTION, LEGAL ADVISER'S OFFICE, DEPARTMENT OF STATE; AND RICHARD H. ABBEY, CHIEF COUNSEL, U.S. CUSTOMS SERVICE

Mr. KNAPP. Thank you. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before this committee to testify in opposition to S. 605, a bill to amend sections 2314 and 2315 of title 18 relating to stolen archeological material.

You have a copy of my prepared statement. I will read an abridged version of that, if it is agreeable with you, Senator.

Senator LAXALT. Thank you very kindly. Your full statement will be filed.

Mr. KNAPP. Thank you.

In order to protect their national heritage, a number of nations have enacted legislation which provides that archeological material of civilizations which once existed within their territorial bound-

aries belongs to the nation, even if such property has not yet been discovered or recovered.

The courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of such property. In addition to a declaration of ownership, our courts have required that the foreign country establish sufficient controls over the property to reflect its ownership interest in order to trigger application of the National Stolen Property Act [NSPA].

S. 605 effectively precludes the assertion of ownership interests of foreign governments in those archeological and ethnological materials from their past that have not yet been reduced to possession by those foreign governments.

S. 605 is an attempt to limit the scope of the National Stolen Property Act, as interpreted by the U.S. Court of Appeals for the Fifth Circuit in *United States* v. *McClain*.

Under *McClain*, if a foreign country declares itself the owner of certain property within its territory which has not been reduced to actual possession and imposes controls over such property to enforce its ownership, its property rights are protected by the NSPA. We believe that the *McClain* decision reflects the proper interpretation of the NSPA.

S. 605 does not directly attack the right of the foreign government to declare ownership of this type of property. Instead, it denies the protection of the act to property which has not yet been reduced to possession even when the defendant was aware of the foreign government's legal claim and the fact that the material had been illegally smuggled out of that country.

The additional burdens placed on the prosecutor to prove the elements of the offense, should S. 605 pass, would, as a practical matter, effectively remove the deterrent aspects of the NSPA as to archeological or ethnological property which has not been reduced by the foreign government to possession since it would be nearly impossible for the prosecution to prove the circumstances of the original taking of the material.

Even in those cases where the object has been reduced to possession, it may make proof of theft more difficult since the defendant will likely claim that he or she discovered it—a claim which, if believed, would remove his or her conduct from the scope of the NSPA.

In our judgment, the deterrent effect of *McClain* is consistent with the U.S. policy of protecting the archeological and ethnological property of foreign nations, as evidenced by Congress' recent enactment of the Convention on Cultural Property Implementation Act and by this Nation's own laws on its own archeological resources.

The former legislation and the convention it implements are intended to supplement existing laws relating to cultural property, and not supplant them. In enacting the Cultural Property Implementation Act, there is no credible evidence to indicate any intent by the Congress to overrule *McClain*. In fact, I have seen portions of the legislative history from the Senate report which state directly to the contrary.

The Department of Justice was involved in the long and arduous legislative process that produced the Convention on Cultural Prop-

erty Implementation Act and we have opposed previous proposals to overrule the *McClain* decision.

We have consistently noted the significant prosecutive burdens which must be overcome in a successful prosecution under the NSPA. We have attached to our report a memorandum summarizing those elements, but I would like to highlight two elements of this offense.

Among other factors, the government has to prove that the material was stolen or unlawfully converted, which means we must be able to establish in the case of foreign archeological material that the foreign country is, in fact, the true owner within the meaning of our law; that is to say that it declared ownership, and not only declared ownership, but that it has affirmatively imposed significant restrictions on exportation; and going beyond that, that this particular defendant knew the material was stolen, unlawfully converted, or taken by fraud. This is a very difficult burden to meet under any circumstances.

We have recognized the lack of any indication of prosecutorial abuse of these statutes in their application to archeological material. We would, however, renew an offer first made almost a decade ago to meet with representatives of legitimate owners of archeological material, including dealers, private collectors and museums, to discuss the adoption of internal Department of Justice procedures which could include preindictment review of proposed prosecutions involving archeological or ethnological material to prevent inappropriate prosecutions.

In sum, however, from a law enforcement perspective, enactment of S. 605 is not desirable.

Senator LAXALT. Those procedures are not now in place?

Mr. KNAPP. No.

Senator LAXALT. Is that a matter of discretion within the Department? Could it choose to do that?

Mr. KNAPP. We could choose to do so.

Senator LAXALT. But you, as a practical matter, would not? You would need a little bit of urging from here or from the interested groups?

Mr. KNAPP. We would be glad to impose such internal restrictions upon some indication of a desire either by this committee or after consultation with the representatives of the groups.

However, a Senator raised a question earlier. In fact, this has not been a pressing problem. Since *McClain*, there have been no actual prosecutions under the act.

Senator LAXALT. Any investigations?

Mr. KNAPP. I understand there may have been one or two.

Senator LAXALT. But they did not result in any actual prosecutions?

Mr. KNAPP. That is correct.

Senator LAXALT. OK.

Mr. KNAPP. S. 605 would impair our ability to prosecute the trafficker in stolen archeological and ethnological materials who flaunts the laws of foreign nations concerning such property.

Though not so intended by its proponents, its enactment could effectively create a legal marketplace within the United States for

the fruits of foreign grave robbery—a situation we cannot countenance.

Thank you for providing us the opportunity to testify and I will be glad to answer any questions the subcommittee may have.

Senator LAXALT. Thank you very much, Mr. Knapp.

If it is acceptable to you, Senator Mathias, perhaps we could hear the full panel and then address questions to them thereafter.

Senator MATHIAS. That is fine.

Senator LAXALT. Thank you very much, Mr. Knapp.

[Prepared statement and responses to followup questions of Senator Laxalt follow:]

U.S. Department of Justice

Washington, D.C. 20530

Testimony

by

James I. K. Knapp
Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice

Mr. Chairman; members of the Subcommittee.

I appreciate the opportunity to appear before this Committee to testify in opposition to S. 605, a bill to amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archeological material.

In order to protect their national heritage, a number of nations have enacted legislation which provides that archeological material of civilizations which once existed within their territorial boundaries belongs to the nation even if such property has not yet been discovered or recovered. The courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of such property. In addition to a declaration of ownership, our courts have required that the foreign country establish sufficient controls over the property to reflect its ownership interests.

Sections 2314 and 2315 of title 18, United States Code, compose the National Stolen Property Act (NSPA). Section 2314 prohibits the transportation in interstate or foreign commerce of goods, wares, merchandise, money, or securities of a value of $5,000 or more knowing the same to be stolen, converted, or taken by fraud. Section 2315, the fencing provision, prohibits the receipt, concealment, storing, bartering, selling or disposing of such property which is moving as, is a part of, or constitutes

interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken by fraud. Under S. 605 sections 2314 and 2315 of title 18, United States Code, would be amended to add at the end of each section the following:

> This section shall not apply to any goods, wares, or merchandise which consists of archeological or ethnological materials taken from a foreign country where —
>
> (1) the claim of ownership is based only upon —
>
> (A) a declaration by the foreign country of national ownership of the material; or
>
> (B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership;
>
> (2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and
>
> (3) the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowledge of the illegal export and the defendant's knowledge of the claim of ownership described in clauses (1)(A)and (B).

S. 605 effectively precludes the assertion of ownership interests of foreign governments in those archeological and ethnological materials from their past that have not yet been reduced to possession by those foreign governments. S. 605 is an attempt to limit the scope of the National Stolen Property Act as interpreted by the United States Court of Appeals for the Fifth Circuit in United States v. McClain, 545 F.2d 988 (1977), rehearing at 551 F.2d 52 (1977), retrial at 593 F.2d 658 (1979). The Department of Justice believes that the McClain decision reflects the proper interpretation of the NSPA. 1/ Under McClain, if a foreign country declares itself the owner of certain property within its territory which has not been reduced to actual possession and imposes controls over such

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1/ Moreover, it is unclear to the Department of Justice exactly which countries are targeted by S. 605. For example, it is our judgment that S. 605 as drafted would not apply to Mexico because that country has established a whole panoply of legal requirements pertaining to such property (e.g., registration, identification procedures, export controls and a national declaration of ownership).

property to enforce its ownership, its property rights are protected by the NSPA.

S. 605 does not directly attack the right of the foreign government to declare ownership of this type of property. Instead it denies the protection of the NSPA to property which had not been reduced to possession by the foreign government even when the defendant was aware of the foreign government's legal claim and the fact that the material had been illegally smuggled out of that country. The additional burdens placed on the prosecutor to prove the elements of the offense will, as a practical matter, effectively remove the deterrent aspects of the NSPA as to archeological or ethnological property which has not been reduced by the government to possession, since it would be nearly impossible for the prosecution to prove the circumstances of the original "taking" of the material. And even in those cases where the object has been reduced to possession, it may make proof of theft more difficult since the defendant will likely claim that he/she discovered it, a claim which if believed would remove his/her conduct from the scope of the NSPA.

In our judgment, the deterrent effect of McClain is consistent with the United States' policy of protecting the archeological and ethnological property of foreign nations, as evidenced by Congress' recent enactment of the Convention on Cultural Property Implementation Act, P.L. 97-446 (title III), January 19, 1983, 96 Stat. 2350, 19 U.S.C. 2601-2613, and by this nation's laws on its own archeological resources (Archeological Resources Protection Act of 1979, P.L. 96-95, Oct. 31, 1979, 93 Stat. 721, 16 U.S.C. 470 aa-11). The former legislation, and the the Convention it implements, is intended to supplement existing laws relating to cultural property and not supplant them. In enacting the Cultural Property Implementation Act, there is no credible evidence to indicate any intent by the Congress to overrule McClain.

The Department of Justice was involved in the long and arduous legislative process that produced the Convention on Cultural Property Implementation Act and we have opposed previous

proposals to overrule the McClain decision. We have consistently noted the significant prosecutive burdens which must be overcome in a successful prosecution under 18 U.S.C. 2314 and/or 2315. (For the benefit of the Subcommittee, I have enclosed with my statement a memorandum discussing the elements of a prosecution under the National Stolen Property Act.) We have also recognized the lack of any indication of prosecutorial abuse of these statutes in their application to archeological material.

We would, however, renew an offer, first made almost a decade ago, to meet with representatives of legitimate owners of archeological material, such as dealers, private collectors and museums, to discuss the adoption of internal Department of Justice procedures which could include preindictment review of proposed prosecutions involving archeological or ethnological material to prevent inappropriate prosecutions.

In sum, however, from a law enforcement perspective, enactment of S. 605 is not desirable. S. 605 would impair our ability to prosecute the trafficker in stolen archeological and ethnological materials who flouts the laws of foreign nations concerning such property. Though not so intended by its proponents, its enactment could effectively create a legal marketplace within the United States for the fruits of foreign grave robbery — a situation we cannot countenance.

I thank you for providing us the opportunity to testify on S. 605. I will be glad to answer any questions the Subcommittee may have.

Applicability of National Stolen Property Act (NSPA) to Certain Forms of Stolen Archaeological and Ethnological Material

For the benefit of the Subcommittee, as well as those persons who have expressed concern over the possibility that the decisions in United States v. McClain, 545 F.2d 988, (5th Cir. 1977), rehearing at 551 F.2d 52 (1977), retrial at 593 F.2d 658 (1979), would create an enhanced risk of prosecution under the National Stolen Property Act (NSPA), the following is provided to illustrate the heavy burden of proof which must be met in order to conduct a successful prosecution under 18 U.S.C. § 2314 and § 2315. Each of the various elements listed below must be proven beyond a reasonable doubt.

18 U.S.C. § 2314

Section 2314 of Title 18, United States Code, provides, in part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Under 18 U.S.C. § 2314 the government would be required to prove:

1. unlawful transportation which requires transportation with a criminal intent or criminal purpose;

2. that the material was transported in interstate or foreign commerce;

3. that the material was "goods, wares, or merchandise";

4. that the material had a value of $5,000 or more;

5. that the material was "stolen, unlawfully converted, or taken by fraud." This means the Government must be able to prove that the foreign country is in fact the true owner. Except for Mexico, most foreign nations, according to our understanding, have not passed appropriate statutes which are sufficiently enforced to give rise to such proof; and

6. the defendant knew the material was "stolen, unlawfully converted, or taken by fraud." In terms of the "thefts" years ago, the normal inference of possession of recently stolen property to show guilty knowledge would not be available. The Government would have to show actual knowledge. The uncertainty of foreign laws and honest claims of innocent purchaser for value without guilty knowledge would be extremely hard to overcome.

18 U.S.C. § 2315

Section 2315 of Title 18, United States Code, provides, in part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In regard to 18 U.S.C. § 2315, besides the similar elements and intent of 18 U.S.C. § 2314, the Government would also have to show the material "is moving as, or which is a part of, or which constitute interstate or foreign commerce" at the time of the operative act (i.e. receive, conceal, store, barter, sell, dispose, pledge, or accept as collateral). Interstate and foreign commerce eventually come to an end. For "thefts" decades ago and for museums who have held such material for years it will be highly unlikely that the Government could prove the material was still in the "movement" condition required by the statute. (Note: The value of the property for the operative acts of pledging or accepting as collateral would only have to be $500 instead of $5,000.)

RESPONSE TO FOLLOW-UP QUESTIONS

Question

1. In your testimony you stated that "[t]he courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of . . . property" which constitutes "archeological material of civilizations which once existed within [its] territorial boundaries." (Knapp Test. at 1) Apart from the Fifth Circuit's decision in McClain, what other courts in this country have recognized this "right" and given it legal effect?

Answer

1. The three Fifth Circuit decisions in McClain at 545 F. 2d 988 (1977), rehearing at 551 F. 2d 52 (1977) and retrial at 593 F.2d 658 (1979) are the only federal reported cases we know in which this specific issue has been addressed. Cf. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974) ("pre-Columbian stella and other artifacts").

Question

2. In your testimony you alluded to the "nearly impossible" burden that S. 605 would place on the prosecution "to prove the circumstances of the original 'taking' of the [cultural] material." (Knapp Test. at 3) Yet this seems no greater than the burden placed on the prosecution when it attempts to prosecute a defendant for violating the NSPA in connection with archeological resources taken from land belonging to the United States government, see Archeological Resources Protection Act, 16 U.S.C. § 470cc, or for violating the NSPA in connection with wild horses taken from federal property in violation of the Wild Free-Running Horses and Burros Act, 16 U.S.C. §§ 1331-1340, see United States v. Tomlinson, 574 F. Supp. 1531 (D. Wyo. 1983). What, then, is the basis for your concern?

Answer

2. Although the two described domestic situations do have

elements that are difficult to prove, thefts which occur overseas are even more difficult to prove. Our criminal process is very limited as to witnesses and evidence located overseas. For instance, to mention but two aspects, no federal district court can issue a search warrant to seize evidence in a foreign country nor can a grand jury compel an alien witness located outside of the United States to appear before it. As you well know, to prove an actual taking requires proof which is often impossible to acquire, even within the United States.

Question

3. Apart from inquiring into the existence of export controls, how have "our courts . . . required that [a] foreign country establish sufficient controls over [cultural] property to reflect its ownership interests"? (Knapp Test. at 1)

Answer

3. In McClain the court felt that the clear Mexican statutes plus its export controls were sufficient. We cannot predict how other courts will evaluate the adequacy of the laws and procedures of other countries in future cases. However the Mexican statutes discussed in McClain would provide other courts with a bench mark.

Question

4. How is McClain "consistent with this nation's laws on its own archeological resources," (Knapp Test. at 4), insofar as the former permits a government to declare national ownership of all cultural property wherever found, whereas the latter expressly vests ownership in the federal government only with regard to objects removed from federal land, see 16 U.S.C. § 470cc?

Answer

4. "Consistency" does not require absolute identity. Both statutes reflect a desire to protect one's past heritage. Both statutes declare where title to the property is vested thereby establishing the basis for civil remedies. While the United States did not elect to assert title over all such property, the

fact that the United States and existing Indian tribes in the United States own vast amounts of land where such artifacts are more likely to be found gives the federal statute broader coverage in fact than its apparently limited scope would suggest.

Question

5. In its report on the CPIA, the Finance Committee stated:

> "The Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries, and these other countries should have the benefit of knowing what minimum showing is required to obtain the full range of U.S. cooperation authorized by this bill." (S. Rep. No. 97-564, at 27)

In your testimony, however, you state that "[i]n enacting the Cultural Property Implementation Act, there is no credible evidence to indicate any intent by Congress to overrule McClain." (Knapp Test. at 4) Why do you believe that the language quoted above is not evidence that Congress intended for our national policy regarding the importation of property to be based on discriminating standards inconsistent with McClain.

Answer

The quote provided does not mention McClain or in any way express disagreement with its holding. Under McClain the characterization by a foreign country of its ownership is not controlling nor is it sufficient to invoke protection of our courts. Moreover, the cited language is addressing potential agreements to be made under the CPIA that will create import controls over certain property. McClain involves a criminal statute that has other elements to protect innocent persons (e.g., the requirement of proof beyond a reasonable doubt that the defendant had knowledge of the stolen nature of the property).

Question

1. Is it the position of the Department of Justice that the proposed legislation would, in effect, prevent the prosecution of most traffickers in stolen cultural properties?

Answer

1. The term "cultural properties" usually means properties that have already been reduced to actual possession (e.g., located in a museum). As to them, the answer would be "No." But as to yet undiscovered archeological or ethnological material or such material previously taken without the approval of a foreign government when it claims ownership of such property, the above statement is accurate.

Question

2. Does the Department of Justice have any information regarding the number of prosecutions that have been pursued recently under the National Stolen Property Act?

Answer

2. While there have been numerous prosecutions for violations of 18 U.S.C. 2314 and 2315, we presume the question intends prosecutions involving archeological and ethnological material under the two statutes. If so, the Department is aware of no prosecutions involving such property under these statutes since McClain. For an earlier prosecution, see United States, v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

Question

3. In your testimony, you mention possible internal procedures for reviewing possible indictments under existing law. What type of internal Department of Justice procedures might be adopted to help prevent the inappropriate prosecution of legitimate art dealers?

Answer

3. One of the procedures that could be developed would be to require that the United States Attorney obtain the approval of the Criminal Division before bringing a prosecution under

18 U.S.C. 2314 and/or 2315 for such property. However, since no legitimate art dealer has complained to us in the past decade about being subjected to prosecution under these statutes, one questions whether any additional administrative controls are necessary.

Question

1. What legal remedies or responses in such cases are available as alternatives to prosecutions under the NSPA?

Answer

1. An owner of property can always file a civil suit for its recovery. "Buyer beware" (caveat emptor) is one of the basic maxims of the common law. In turn, a bona fide purchaser of stolen property who returns it to the lawful owner, either voluntarily or as the result of a judicial order, may have recourse against the person from whom the object was acquired.

Question

2. Under the law of Mexico, can a private party legally own (as opposed to possess) pre-Columbian artifacts?

Answer

2. Assuming that the private party is in Mexico and that the object is a pre-Columbian artifact of Mexican provenance, and that the object has been in Mexico since its creation, we believe the answer is probably no, at least insofar as article 27 of the 1972 Mexican Federal Law on Archeological, Artistic and Historic Monuments and Zones is controlling.

Senator LAXALT. Our next witness, then, will be Ely Maurer, the Assistant Legal Adviser. Mr. Maurer?

STATEMENT OF ELY MAURER

Mr. MAURER. Mr. Chairman and members of the subcommittee, my name is Ely Maurer. I am an Assistant Legal Adviser dealing with educational and cultural matters, and I represented the State Department in the deliberations leading to the enactment of the Convention on Cultural Property Implementation Act.

I am accompanied by Frances Armstrong, of the Latin American Section of the Legal Adviser's Office, who played a major role in the negotiation of the bilateral agreements with Peru, Guatemala, and Ecuador.

I am pleased to have the opportunity today to appear before this Subcommittee to present the views of the Department of State regarding S. 605.

S. 605 would amend the National Stolen Property Act to create an exception for archeological and ethnological materials illegally exported from a foreign country whose government claims ownership on the basis of a declaration of national ownership or the functional equivalent thereof. The Department of State believes that such legislation is undesirable from both a domestic law enforcement and international relations standpoint.

The Department shares the view just expressed by Mr. Knapp that the *McClain* decision, which S. 605 would override, represents the correct interpretation of the National Stolen Property Act, and that its legislative override would unduly hamper the prosecution of activity which is, and should continue to be, considered criminal.

The Department's principal concern, however, is the adverse impact which adoption of S. 605 could be expected to have on our relations with other countries. Although the Department has not made a comprehensive survey of present legislation in other countries, a significant number of foreign countries, perhaps two dozen, appear to have legislation which, at least for some categories of cultural property, might meet the *McClain* standards for raising a question of the applicability of the National Stolen Property Act. Not surprisingly, the vast majority of countries within this country are treaty partners of the United States through the Unesco Convention.

While the present bill has been presented as having its foundation in the Convention on Cultural Property Implementation Act, the implementing legislation for the Unesco Convention, the Department believes that its enactment would signal a significant departure from principles upon which that convention was based. Neither the convention nor the Act was intended to limit pre-existing domestic remedies for the recovery of stolen cultural property. Countries having archeological and ethnological materials in great demand in the international art market would view the legislative override of the *McClain* case as depriving them of meaningful cooperation in the recovery of the cultural property which they have determined to be most important to their heritage; namely, that which has been declared to be the property of the nation. In those countries, particularly the countries of Latin America, with which

we have a variety of ongoing law enforcement problems, the elimination of such potential cooperation could prejudice our relations in other areas of primary concern to us.

The Unesco Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property established certain special procedures for cooperation amongst party states, now 55 in number, in the protection of cultural property. In negotiating and in seeking the ratification of the convention, the Department recognized the role which the National Stolen Property Act would continue to play, alongside the convention, in assisting governments to recover stolen cultural property brought into this country. In its 1971 letter of submittal of the convention, the Department stated:

> Article 7(b) does not affect existing remedies available in State or Federal courts. The purpose is to provide a framework for special Government cooperation. U.S. laws prohibit the knowing receipt and transportation of stolen property in interstate and foreign commerce. Stolen cultural property frequently can be recovered by normal police cooperation. Shortly thereafter, the letter specifically cited the National Stolen Property Act: "With respect to article 7(b), the laws of the United States, and presumably the laws of most states, prohibit theft and the receipt and transportation of stolen property. (See Title 18, U. S. Code, 2314, 2315.)

The convention was not intended, nor should it now be used as an excuse to limit the availability of ordinary police cooperation in the recovery of cultural properties stolen from a foreign government.

Proponents of the present bill assert that the legislative reversal of the *McClain* case was part of a compromise which enabled the unanimous adoption of the Unesco implementing legislation after 11 years of frustrated attempts by supporters of the legislation. The Department of State wishes to make it a matter of record that it has never supported or agreed to support the proposed limitation of the applicability of the National Stolen Property Act with regard to archeological and ethnological materials as part of any legislative package to implement the Unesco Convention.

Further, the Department does not agree that the CCPIA established any national policy regarding the importation of archeological and ethnological materials which requires the override of the *McClain* decision. Section 303 of the CCPIA authorizes the President under certain circumstances to apply specific import restrictions with regard to archeological and ethnological material found to be in "jeopardy of pillage" in their country of origin. One of the requirements is that this be done as part of a "concerted international effort" to protect the materials. I might digress for one moment to say that Senator Moynihan referred to the "concerted international effort" as requiring seven to nine countries. That particular point was raised in the course of the deliberations on the CCPIA, but, in fact, there was no such language put into the statute. The statute merely reads that the countries that shall be involved are those which have a significant import trade in a particular cultural object.

Under the terms of the CCPIA, this requirement of a concerted international effort is relevant only to section 303 and a situation of pillage. It does not apply, and cannot be considered to apply as a limitation on assistance which may ordinarily be afforded a foreign

government in recovering stolen cultural property. Neither the Unesco Convention nor its implementing legislation requires that importers of certain archeological and ethnological materials be effectively immunized from the ordinary application of U.S. criminal law.

Proponents of S. 605 have also questioned the consistency with the CCPIA of bilateral agreements recently concluded with several Latin American countries for law enforcement assistance in the recovery of stolen cultural property. The agreements in question are in force with Peru and Guatemala; another with Ecuador awaits ratification by that country. They follow in large measure the terms of a treaty which entered into force with Mexico in 1971. The central provision of each of these agreements obligates each party at the request of the other to use the legal means at its disposal to recover and return to its territory stolen archeological, historical and cultural properties removed from the territory of the requesting party.

Implementation of these agreements turns entirely on the operation of the U.S. law. They do not, as has been suggested, enable the Customs Service or any other Federal law enforcement authority to seize objects and return them to a foreign government on that government's representation of its laws. Nor do they alter in any way laws governing the importation of cultural property into the United States.

These agreements, in the Department's view, are neither affected by nor inconsistent with the CCPIA which, for the reason just given, does not purport to limit ordinary police cooperation in the recovery of stolen property.

Adoption of the proposed bill would have an impact on the bilateral agreements with Mexico and Peru, both of which have declared ownership of pre-Colombian monuments. I might digress and say that we understand that Peru has recently modified its law so as not to declare ownership immediately at the time of declaration, but merely at the time of illegal exportation. We do not believe, on a hasty reading, that the situation has basically changed.

While prosecution under the *McClain* theory has not yet resulted in recovery of artifacts by either Mexico or Peru, the *McClain* artifacts themselves still awaiting a piece-by-piece determination of ownership by the fifth circuit, the Department believes that that possibility should remain open.

As Mr. Knapp has explained, the burden of proof on the prosecution under the National Stolen Property Act as presently written is high. Given the myriad criminal statutes under the enforcement responsibility of Federal agencies, the Department cannot readily foresee the *McClain* interpretation being put forward in other than egregious cases; that is, cases presenting very clear evidence of actual knowledge on the importer's part of both a foreign ownership claim and export prohibition.

In such cases, the Department of State would find it very difficult to justify to foreign governments the elimination of a presently available remedy, one which follows from longstanding common law principles and which parallels relief expressly provided in the case of archeological resources declared to be the property of the United States by the Archeological Resources Protection Act.

I would digress one moment here to amplify that. In listening to Senator Moynihan and in listening to Professor Bator, I noted that nothing has been said by them on the existence of our own internal situation which parallels that which is reflected in laws of Mexico, Peru, and maybe other countries. In other words, we, too, in the United States have laws which declare by fiat of the State that certain property not in its possession, underground, wherever it may be, is the property of the Government and may not be brought into private control or private possession. I refer to the law of the State of Georgia which declares that alligators belong to the State, and the alligators are floating around in the streams, on private property, what have you. It has been considered to be a violation of the National Stolen Property Act when an individual killed an alligator and tried to transport the skin to another jurisdiction.

I also refer to the Archeological Resources Protection Act which has declared that artifacts underground on Government property or on Indian lands which are excavated and dug up are the property of the United States, and that the persons involved can be prosecuted for stealing under the National Stolen Property Act. We may have an exact situation comparable to Mexico and Peru if we seek to recover some part of our national patrimony which falls under the Resources Act and has found its way into the possession of art dealers in Switzerland.

So I say that there has been a complete absence of any reference to these laws of the United States, which laws we feel are perfectly proper and an exercise of the sovereignty of the United States, and where we are doing what these other countries have done abroad.

Let me conclude my statement. Through the negotiation of the Unesco Convention and the more recent bilateral agreements, the Department has sought to establish the United States as a responsible partner in the protection of significant cultural property from theft or other destruction. The continued availability of ordinary police cooperation in the recovery of stolen cultural property of all kinds is important to our international position. Adoption of the proposed legislation would signal a significant reversal of that policy to the other parties to the Unesco Convention as well as to artifact-rich countries of Latin America with which we have entered into separate agreements. As the United States must look to these same countries for law enforcement cooperation in other fields, it seems very short-sighted to exempt foreign government property from any of the ordinary protections afforded by U.S. law.

I thank you for the opportunity to address these points and we will be pleased to answer any questions you might have.

[The following was subsequently supplied for the record:]

Questions and Answers for First Series of Questions

QUESTION

"1. What is the basis for your contention that a foreign country's declaration of national ownership of cultural property found anywhere within its borders 'follows from longstanding common law principles'? (Maurer Test. at 6) Doesn't the common law require a possessory interest in either the property at issue or the site from which it was removed? Please provide cases or other authority demonstrating those "common law principles."

ANSWER

Under the common law (as well as other systems of law) the declaration by a state of national ownership of certain property does not require that the state have a possessory interest in that property for the declaration to be effective. Nor must the state own the site from which the property was removed. We can point to these areas of law as illustrative: (A) Treasure Trove; (B) Nationalization of Subsoil Mineral Resources; (D) State Ownership of Wildlife.

(A) Treasure Trove. The doctrine of Treasure Trove is that the sovereign or the government is entitled to treasure (originally only gold and silver), buried in the ground for many years, the ownership of which is unknown. In this connection we refer to the book by Sir George F. Hill, Director of the British Museum, "Treasure Trove In Law and Practice from the Earliest Time to the Present Day" (Oxford, Clarendon Press 1936). The book reports numerous examples of laws going back through the centuries to early times, issued by sovereigns or governments, vesting title in whole or in part in treasure found under the ground (even though the treasure is not found on public lands and has not previously been reduced to possession). See, for example, laws issued by: Emperor Constantine, 315 (p. 25); Emperor Charlemagne, 789 (p. 52); Saxony, Germany, before 1220 (p. 57); Bavaria, Germany, 1474 (p. 71); Bern, Switzerland, 1487 (p. 74); Austria, 1771 (p. 82); Venice, Italy, 1488 (p. 109); Spain, 1387 (pp. 118-9); France, between 1137 and 1180, (p. 131); Utrecht, Netherlands, about 1400 (p. 163); Denmark, 1241 (pp. 175-6); England, before 1118 (pp. 186-7); Scotland, before 1655 (pp. 256-7); Wales, before 1200 (p. 263); Ireland, 1495 (pp. 264-5); India, 1777 (p. 267); Greece 1918 (p. 276); New York, before 1829 and in 1889 (p. 287). In some cases laws were issued giving the finder or site owner a reward or part compensation for the treasure found. See, for example, laws issued by: Spain 1387 (pp. 118-9); Syria-Lebanon Mandate, 1933 (p. 161); Norway, 1905 (pp. 182-3); Peru, 1929 (pp. 291-2). In other cases, laws were issued providing for full value to the finder, while retaining title to the treasure in the government. See, for example: England, 1931 (p. 242); Scotland, 1889 (p. 262); Ireland, 1891, (p. 264); Ceylon 1887 (p. 269). In still other cases the laws might in fact establish a different rule, giving title to the treasure to the finder or site owner. See, for example: Spain, 1889 (p. 121); Portugal, 1867 (p. 126); France, 1804 (p. 158); India, 1878 (p. 267). Modifications of the rule that the treasure belongs to the sovereign or government, without sharing or compensation, appear to have come about on the basis of considerations of fairness, and also to stimulate the disclosure and the preservation of finds. See, pp. 34, 239, 241, 243. But such modifications were not brought about because there was considered to be some flaw in the vesting of title to property because it was not on government land or in the government's possession.

Further, it should be noted that the doctrine of Treasure Trove has been enlarged, beyond its original coverage of gold and silver, not only to cover precious stones, ornaments, jewelry, coinage of baser metal, but also to cover

antiquities. This is particularly significant, for these laws may be considered as the natural predecessors to the more recent laws of Latin American and other countries claiming archeological treasures. Thus, laws asserting title to antiquities for the sovereign or government (without regard to ownership of the site or possession) are reported in Hill's book. See, for example: Schleswig, Denmark, about 1800 (p. 83); Tuscany, Italy, 1762 (p. 111); Denmark, 1737 (p. 176); Norway, 1905 (pp. 182-3); Scotland, 1655 (pp. 202, 258-9); Ceylon, 1887 (p. 269).

Finally, it should be noted that several instances are given where the taking by finders of the treasure is variously characterized as theft, embezzlement, stealing or as being subject to criminal prosecution and to civil action. See, for example: Germany (pp. 84, 95-6); Austria (p. 97); Siena, Italy, (p. 110); Spain (p. 122); Palestine (p. 133); France (p. 161); Denmark (p. 175); England, (pp. 192, 215, 225-228); Scotland (pp. 259-60); China (p. 286). It is noteworthy that under the law of England title is deemed to be vested in the sovereign or government not when the discovery is made but while the Treasure Trove is still undiscovered and in the ground (pp. 215-6). In fact, the sovereign or government, having an ownership right, can give licenses for excavation, even on private property, to uncover a suspected treasure (pp. 216-7). However, under English law the offense of larceny may not lie because of the technical requirement of a violation of possession (p. 228); but a prosecution can take place for concealment of the treasure (p. 215).

It is clear from the above that we are dealing here not only with common law rules of Treasure Trove but rules prevalent in other systems of law--rules which operate to give title to the governments concerned without regard to prior possession or government site ownership.

B. Nationalization of Subsoil Mineral Resources. Numerous countries have taken title to subsoil mineral wealth without regard to whether the governments own the sites involved and without regard to whether the subsoil minerals are already discovered or unknown. We have not been able to look into statutory laws but, on the basis of a quick, non-exhaustive review, have found in Blaustein and Flanz, Constitutions of the Countries of the World the following illustrative constitutional examples: Benin, (Article 21); Burma (Article 18); Cape Verde (Article 11); Chile (Article 24); Costa Rica (Article 121, subsection 14(b)); Guatemala (Article 63); Sudan (Article 7); Taiwan (Article 143); United Arab Emirates (Article 21). It seems quite clear that for such countries, if a case were to occur, say, of discovery of oil, heretofore unknown, under the land of a national of the country, the oil would be considered the property of the country involved, and no question would be raised about the title to such oil were the oil to come to the United States (or other countries). See A.L.I. Restatement (Second), Foreign Relations Law of the United States, Section 41 generally and Illustration 8 under Comment d; also Final Tentative Draft (1985) Sections 469, 470.

C. State Ownership of Wildlife. Louisiana has declared its ownership of wild alligators and other wild quadrupeds. See 56 L.S.A. R.S. 102. It is clear that the animals involved are roaming freely, may be located on private waters and lands, and have not been reduced to State possession. Judge Charles P. Sifton in the case of United States v. Klapisch, United States District Court, Eastern District of New York, citing 56 L.S.A. R.S. 102, refused to dismiss an indictment charging violation of the National State Property Act (NSPA), holding that the Louisiana declaration of ownership of alligators suffices "to establish that the skins of wild alligators may be shown to have been 'stolen' within the meaning" of the NSPA (unreported decision of July 28, 1978, docket number 77 CR 620). Similarly, in United States v. Plott, 345 F. Supp. 1229, 1232 (S.D.N.Y. 1972), on the basis of Georgia's ownership of

wildlife in a trust capacity for its people, the court refused to dismiss an indictment charging a poacher of alligators with a violation of the NSPA. See also Answer to Question 12 below.

These cases, and particularly the Louisiana case, illustrate again that the assumption of title by a state to property may take place under the common law without a possessory interest in the property or ownership of the site.

QUESTION

"2. You indicated that McClain 'parallels relief expressly provided in the case of archeological resources declared to be the property of the United States by the Archeological Resources Protection Act.' Yet that Act expressly asserts the United States' ownership only as to artifacts found on federal land. See 16 U.S.C. § 470cc. How is this analogous to a foreign statute declaring ownership of all cultural property, wherever found?"

ANSWER

The Archeological Resources Protection Act covers public lands and Indian lands. However, Indian lands includes also lands owned by individual Indians and lands owned by Indian tribes. The Act asserts U.S. ownership only to artifacts found on lands owned by the U.S. As is evident from the provisions of the Act, as well as by the implementing regulations, the U.S. does not assert title to artifacts under land owned by individual Indians or Indian tribes. These remain and are asserted to be the property of the individual owner and tribe.

The testimony referred to a parallel in "relief" afforded by the Archaeological Resources Protection Act and the National Stolen Property Act as applied by the court in McClain. In the Archaeological Resources Protection Act of 1979, the United States -- which owns vast public lands and has a special relationship with the direct descendants of its pre-Columbian settlers who own other large areas of lands with known archaeological resources -- established criminal penalties for the knowing commerce of resources unlawfully removed from these lands. The United States considers such property to have been stolen. Similarly, the National Stolen Property Act entails criminal penalties for knowing interstate or international transportation of stolen property, interpreted in McClain to include archaeological resources owned by a foreign government and unlawfully removed from its territory.

Just as the United States freely determined the extent of protection (including ownership) which its laws would give archaeological resources, it is the sovereign right of other nations to make similar determinations for themselves -- including whether to declare some or all archaeological resources to be the property of the nation even though found on private property. The McClain case, by recognizing such a declaration of national ownership in conjunction with export controls for the purpose of determining whether foreign archaeological resources may be considered stolen under U.S. law, gives effect to the ownership right of that foreign government in the same way as the Archaeological Resources Protection Act preserves national and native American ownership of resources found to require special protection within the United States.

QUESTION

"3. Among the grounds on which you seek to defend continued use of McClain is the fact that the State Department, in transmitting the UNESCO CONVENTION TO Congress, stated that the Convention would not affect 'existing remedies.' (Maurer Test. at 3) Are there any cases indicating that a McClain-type action was part of the 'existing remedies' at the time?

ANSWER

At the time when the UNESCO Convention was submitted to Congress in 1972 the Department made clear that the Convention was not meant to affect any existing remedies. It is our understanding that the State Department officials who were involved with the submission of the Convention to Congress were fully aware of the NSPA and had consulted with Department of Justice officials on the possible application of that Act and had been advised that if under the law of another country certain property originating in that country was considered stolen under the law of that country and if that property came into the United States, a prosecution could lie under the NSPA.

Further, when the McClain case came later to the State Department's attention, it was not considered an unusual development under the NSPA or that there was any flaw in Mexico's vesting of title to undiscovered objects, even in the absence of possession of the objects, in view of the law of Treasure Trove and the law as to nationalization of subsoil mineral resources.

QUESTION

"4. In your testimony you state that 'perhaps two dozen' countries 'appear to have legislation which, at least for some categories of cultural property, might meet the McClain standards for raising a question of the applicability of the National Stolen Property Act." (Maurer Test. at 27). At the hearings last month, the Justice Department's witness indicated that only Mexico's claim give rise to potential liability under the NSPA. In 1977, Customs issued two analyses of the laws of several countries; its research into which claimed ownership of cultural property were in some cases inconclusive and in some cases the analyses produced inconsistent results. Please identify those countries which you believe to have declared ownership of cultural property and summarize the relevant provisions of these laws. In particular, what basis is there for holding that Peru, Guatemala or Ecuador have asserted a valid ownership interest?"

ANSWER

No agency of the U.S. Government has undertaken a comprehensive survey of legislation affecting archaeological resources worldwide with a view to determining which countries could satisfy the McClain standards. Rather, as governments request assistance in recovering items or Customs or the Justice Department investigates potential violations of U.S. law related to archaeological artifacts of foreign origin, the legislation of individual countries is reviewed. To date, the only foreign laws in this area to have been found sufficient by U.S. courts to sustain NSPA prosecutions are Mexico and Guatemala. For the latter case, see U.S. v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974). In negotiating agreements with Peru and Ecuador on the recovery of stolen cultural property, the Department found that Peru but not Ecuador had legislation broadly declaring national ownership of archaeological resources. The Peruvian declaration of ownership contained in a 1929 statute, however, was repealed by legislation enacted in December 1984. Ecuadorean law, in contrast, refers generally to archaeological resources as part of the national cultural patrimony but does not specifically declare them to be the proprerty of the nation. The Department would refer the Committee to two publications for information on the content of foreign legislation regarding cultural property: Burnham, The Protection of Cultural Property: Handbook of National Legislations (1974), and UNESCO, Protection of Movable Cultural Property (1984). Based on these publications, it appears that the following countries -- in addition to Mexico and Guatemala -- have declared national ownership with respect to some categories of archaeological resources: in Latin America,

Belize, Colombia, Costa Rica, the Dominican Republic, El Salvador, Haiti, and Panama; in the eastern Mediterranean, Egypt, Greece, Iraq, Jordan, Kuwait, Lebanon, and Turkey; and in Africa, Algeria, Liberia, Mauritania, Nigeria, Tanzania, and Tunisia.

QUESTION

"5. In your testimony you alluded to Peru and indicated that Peru did not assert national ownership of a piece of cultural property until someone attempted to export it from the country. You indicated that you believe this to be a sufficient declaration for purposes of invoking the NSPA. How does this declaration -- effective only at export -- differ from an export control which, by itself, would not provide a basis for criminal prosecution or for an import restriction under U.S. law? Isn't this precisely the sort of scheme that the House of Lords, in the recent case of Attorney General v. Ortiz, refused to recognize as conferring a valid ownership interest?"

ANSWER

Peruvian legislation affecting cultural property is in the process of revision. Law 24047 (The General Law of Protection for the National Cultural Patrimony, which took effect January 6, 1985) repealed all prior legislation in this field -- including the 1929 law containing the declaration of national ownership with respect to pre-Columbian monuments -- and appeared to establish the framework for the expropriation of any cultural property (not just pre-Columbian materials) upon illegal export. As the final implementing regulations for the new law have not been issued, we cannot say what form the controls on archaeological materials will ultimately take.

Legislation which effected the expropriation of material upon illegal export would appear to offer the same recourse to the National Stolen Property Act afforded by a national declaration of ownership. A parallel may be seen in Attorney General v. Ortiz, where New Zealand sought by law to take title to Maori antiquities when they were attempted to be exported from the territory of New Zealand. As is stated later in our reply to Question 2 of the Third Series of Questions, the lower court in the U.K. considered that New Zealand had effectively taken title to the Maori antiquity involved in this case and that New Zealand was entitled to recover the antiquity, which by this time had been brought to England. The upper courts in the U.K. reversed on the basis of their reading of the New Zealand statute, holding that it did not constitute an automatic and immediate taking of title but merely made the item "liable to forfeiture." While U.S. courts have not yet considered the question, such a distinction might reasonably be applied to the NSPA as well, treating a foreign statute which automatically vested property in the State upon illegal export as the basis for finding that property to have been stolen.

QUESTION

"6. It is my understanding that Guatemala, one of the countries with which the United States has a bilateral agreement concerning cultural property, has suspended its constitution, which is the document that contains the declaration. What in your view is the effect of this suspension on the agreement or on the validity of Guatemala's ownership interest in cultural property?

ANSWER

The Guatemalan Constitution of 1965 was repealed by Decree Law 24-82 of April 27, 1982, the statute under which the present Government of Guatemala will continue to operate until the

inauguration of an elected civilian government on January 14, 1986, at which time a new constitution will take effect. Article 63 of Law 24-82, like the Constitution of 1965 and the one due to take effect in January, contains an express declaration of national ownership with respect to "archaeological monuments and remains." The presence of such a declaration, however, is not a prerequisite for the implementation of the bilateral agreement signed in May 1984. The agreement pledges law enforcement assistance in the recovery of cultural property stolen from national, state, or municipal governments or their instrumentalities. It is in no way predicated upon the existence of a declaration of national ownership such as was at issue in McClain. However, certain cultural property may fall within the scope of the agreement by reason of the declaration referred to.

QUESTION

"7. The 1982 Senate Report on the Cultural Property Implementation act (No. 97-564) states that the United states should reach an independent judgment regarding the scope of import controls. Specifically, it declares that "U.S. actions need not be co-extensive with the broadest declarations of ownership and historical or scientific value made by other nations." (Id. at 27) How is this finding consistent with your support of McClain and broad foreign declarations of ownership?"

ANSWER

The Senate Report is addressing itself to agreements to be made under the CPIA which require a showing of pillage of the patrimony and an agreement by the United States on the import controls it is willing to impose. Of course, the United States will only wish to impose import controls with respect to items being pillaged. As we have stated in our testimony, the CPIA provisions, and the Report construing them, should not be considered to control existing other remedies, one of which is the NSPA. That remedy is dependent on the existence of an ownership in a foreign government of an item of cultural property. We support the principle of the McClain case, but it is for the courts to determine in a particular case whether in fact the government in question has assumed such ownership. We do not think that courts will make such a determination on the basis of mere statements relating to objects being part of the national patrimony,nor do we urge that they do so.

QUESTION

"8. The Report on the CPIA also embraces 'the concept that U.S. import controls should be part of a concerted international effort . . .' so that 'U.S. controls would not be administered unilaterally." (Id.) How is this policy consistent with your entering into bilateral agreements with Guatemala and Peru or others to control imports of cultural property?"

ANSWER

The sentence quoted from the Report on the CPIA refers only to agreements under the CPIA. Those agreements will have specific provisions for putting import controls on particular artifacts. The view of Congress, as reflected in the legislation, was that such specific import controls, which are to be published in the Federal Register and which become law, are not to be put into effect except as part of a "concerted international effort." As we have said in our testimony, we do not agree that the language of "concerted international effort" applies to agreements not made under the CPIA nor can that language be considered as emanating a policy that controls the government in the use of other remedies which, as we have said, the CPIA was not meant to affect.

The bilateral agreements with Guatemala and Peru do not impose special import controls on specific artifacts. These bilateral agreements merely confirm the availability of mutual assistance, in accordance with present law, in the recovery of cultural property stolen from the government or government entities of one country and found in the other. These agreements are not affected by nor do they fall under the CPIA.

QUESTION

"9. In deciding whether the State Department should enter into its recent bilateral agreement with Guatemala or the forthcoming agreement with Ecuador, did you satisfy yourself that U.S. action would be part of a multinational response? Was there consideration of whether the agreement would address a particular problem of pillage which placed that country's cultural patrimony in jeopardy?"

ANSWER

Again, we would say that the concept of "multinational response" or "concerted international effort" is a concept that only pertains to agreements made under the CPIA (dealing with pillage and imposing specific import controls) and that the provisions of the CPIA do not emanate a policy which governs bilateral agreements made outside the CPIA. Thus, the bilateral agreements which have been signed with Peru, Guatemala, and Ecuador exist entirely apart from the UNESCO Convention and the CPIA. They are ordinary law enforcement cooperation agreements which--unlike the agreements for the imposition of import controls authorized by the CPIA--are not directed to situations of pillage and do not impose specific import controls on particular artifacts.

QUESTION

"10. List all concrete steps, if any, that the State Department has taken since the CPIA became law in January 1983 to encourage art-importing countries to ratify and implement the UNESCO Convention and to assure the multinational response contemplated by CPIA. List each art-importing country the State Department has specifically encouraged to join in the multinational response contemplated by the CPIA. If no actions were taken, explain why."

ANSWER

In January of 1983, when the CPIA was becoming law, the Department was approached by a representative of the British Government on the CPIA and the difficulties that the British Government perceived in adhering to the UNESCO Convention. We took the occasion to explain our views on the Convention, how certain objections that the British might have could be met, and we encouraged them to adhere to the Convention. Shortly thereafter, the Department was approached by a representative of the Australian Government. We explained our position on the Convention and the various aspects of the CPIA and encouraged Australia also to adhere. In addition, in the course of meetings and conferences in Paris, Mexico and Istanbul, government representatives have supported resolutions or recommendations or taken other action promoting the UNESCO Convention and urging other countries to adhere. In addition, we have suggested to representatives of the Society for American Archeology and other societies involved in supporting the legislation that they should seek out their counterparts in foreign countries and urge upon their counterparts that they approach their governments to urge them to adhere to the UNESCO Convention. Thus, we understand that recently at the 50th Annual Meeting of the American Archeology Society contacts were made with various countries present pointing to the support of the UNESCO Convention.

We have been advised by the Cultural Property Advisory Committee staff that France has drafted implementing legislation which is winding its way through that country's national government and that the Federal Republic of Germany and Australia have renewed their efforts to pass implementing legislation in recent years. Further, we have been advised by the Cultural Property Advisory staff that Belgium, Netherlands and Norway are contemplating legislation.

QUESTION

"11. List each country which you believe currently suffers from a particular problem of pillage which has placed that country's cultural patrimony in jeopardy and briefly explain the problem."

ANSWER

The matter of examining whether a particular country is one which qualifies as having a problem of pillage which has placed that country's cultural patrimony in jeopardy is one which falls within the responsibilities of the Cultural Property Advisory Committee established under the Cultural Property Implementation Act. The Cultural Property Advisory Committee is to review all the information provided by the country involved, as well as any information obtained from other sources. The Committee then makes a recommendation to the President, or his designee. These cases are extremely complex in nature. The Department does not believe that it should attempt to preempt the functions of the Cultural Property Advisory Committee by giving any views as to the situation in particular countries.

QUESTION

"12. When you prepared your testimony, were you aware that United States v. Plott, 345 F. Supp. 1229 (S.D.N.Y. 1972), the decision concerning "ownership" of alligators, has been strongly criticized in several Court of Appeals decision, including McClain itself, see 545 f.2d at 1002, n.31; see also United States v. Long Cove Seafood, Inc., 582 F.2d 159, 163 (2d Cir. 1978), and that the Supreme Court had previously described the states' purported ownership interest in all their wildlife as "fiction," see Toomer v. Witsell, 334 U.S. 385, 402 (1948)?"

ANSWER

The Plott case goes on the basis that a violation of NSPA Section 2314 occurs when an object is "stolen" or "converted," and that these words cover the "taking" of alligators which are owned in trust by the state of Georgia (p. 1232). Before reaching this basis of decision, the court said that even if the State did not own the wildlife involved there might still be a stealing "since the act of stealing is as much defined by the taker's intent to keep property to which he has no right as it is by esoteric questions of legal title in others." It is this alternate basis of decision and only this alternate basis of decision that the court in the McClain case, 545 F.2d at 1000, n.31, took issue with, indicating it believed that stealing involved deprivation of an "owner of his rights in property." And United States v. Sea Cove Seafood, Inc., 582 F.2d 159, 163, supports the McClain case criticism only of this alternate basis.

As regards the decision in the Toomer case, the Supreme Court merely held that the property rights of the state in its fish and wild game would not serve to justify an extremely discriminatory law otherwise in violation of the Privileges and Immunities Clause and the Interstate Commerce Clause. But the Toomer decision does not relate to the application of the NSPA

and whether the taking of state wildlife by individuals might be "stealing" in violation of the NSPA. As far as we know, no court has criticized the Plott holding on the state's properietary interest as being inadequate to support a charge of an NSPA violation. Judge Sifton, in United States v. Kaplisch (referred to in reply to Question 1 of the First Series of Questions), held that such a violation could occur, notwithstanding the Toomer type language, in the light of the Louisiana statute declaring ownership of the wildlife involved.

Questions and Answers for Second Series of Questions

QUESTION

"1. Are you aware of any serious incidents when a foreign nation has strongly objected to specific acts of cultural property exploitation? If so, how are these situations normally handled?"

ANSWER

Generally speaking, the posture of the Department of State faced with a complaint from a foreign government is to offer appropriate assistance. First, the Department determines the facts and then it informs the foreign government of its analysis and works with it, if at all possible, to alleviate the situation. An example of such cooperation in the face of serious evidence of damage to foreign cultural property may be seen in the Department's proposal of legislation in 1971 to make it unlawful to import into the United States pre-Columbian monumental sculpture or murals without proper documentation from the country of origin. This proposal was made in direct response to the complaints of numerous countries in Latin America of the pillage of important pre-Columbian sites and reflected the Department's conclusion that such action on the part of the United States would help deter their continued destruction.

A specific incident of a bilateral nature involved the Indian Government, which approached the Department in 1982, seeking the Department's assistance in recovering a Nataraj (Dancing Shiva), described as priceless, which had been stolen in 1978 from a temple in southeast India and had been purchased in London in 1979 by a museum in Texas. Department officials first contacted the Chief Counsel of the Customs Service and were advised that no customs violation had occurred which might be the basis for a forfeiture of the Nataraj and later return to India. Department officials then met with the Indian representatives and explained the lack of a Customs remedy, and also, that there appeared to be no basis for any criminal prosecution under the HSPA for the transportation of stolen property in interstate commerce in the absence of proof of scienter. In the circumstances, the Department encouraged the Indian Government to establish direct contact with the museum officials. The Department sought to use its good offices; and the Indian Government representatives established direct contact with the museum officials and ultimately worked out a satisfactory settlement of the matter with them.

Of course, the Department is not always able to accommodate foreign government requests for assistance in protecting or recovering cultural property. Latin American governments have, on occasion, sought the intervention of the Department of State to stop the public auction in the U.S. of items -- primarily, pre-Columbian artifacts -- belonging to their national cultural patrimony. The Department has generally advised these governments that it is unable to represent them before the auction houses and bring about a stopping of the auction. In one case involving colonial paintings stolen from churches in Peru, it assisted the Peruvian Government to understand gallery

policies relating to adverse claims so that Peru was able to persuade the auction house on the basis of its own policies with respect to stolen property to refrain from the scheduled auction, and ultimately to recover the paintings directly from the consignors.

QUESTION

"2. Do you have any indication that other nations of the world are considering comprehensive ownership claims for protecting their cultural properties?"

ANSWER

The Department is not aware of any country which is planning to enact a comprehensive ownership claim regarding cultural properties.

Questions and Answers for Third Series of Questions

QUESTION

1. Why should the kind of activity present in the McClain case be considered criminal? Why aren't civil sanctions sufficient?

ANSWER

McClain involved intentional taking of property known to belong to another party, which taking is one of the oldest of crimes. In every case of stealing of property there is the possibility not only of a criminal prosecution but also of a civil action. In many cases the prosecuting authorities will use their prosecutorial discretion to determine whether a case is of such a nature as to warrant the government becoming involved. In terms of a deterrent, there is no question that a criminal prosecution can often be more effective. Also, a criminal prosecution constitutes an indication by the U.S. Government of its sympathy with an aggrieved country in recovery of precious items of its patrimony. It should be noted, also, that if a criminal prosecution takes place, there is need of proving "scienter" or "knowledge" and therefore a suit would only be brought in egregious cases. Where a possessor is an innocent purchaser of a stolen item, civil actions would be enough.

QUESTION

"2. How many other nations have rules of law similar to the rule in McClain?"

ANSWER

We believe that the United Kingdom has a rule of law similar to the rule in the McClain case, namely, that its courts will recognize title in a foreign government based on that government's legislation taking title to cultural property, even property not in its possession. Thus, in the case of Attorney General of New Zealand v. Ortiz, (1982) 3 All. E.R. 432 (Q.B.), the court held that New Zealand had taken title by its law of all Maori antiquities attempted to be exported and that this title was a valid basis for a suit to recover the particular Maori antiquity involved. The court also cited in support the case of King of Italy v. Marquis Cosimo di Medici Tornaquinci (1918) 34 TLR 623, where the court there involved was prepared to order the return of papers in England to which the Government of Italy had acquired title under Italian law. The Ortiz decision was reversed by the

upper courts, but this was on the basis of their interpretation of the New Zealand statute that New Zealand had in fact not taken title because the statute was worded prospectively and only made the antiquities in question "liable to forfeiture." See Attorney General of New Zealand v. Ortiz [1982] (3 All. E.R. 451 (Ct. of Appeal); [1983] 2 All. E.R. 93 (House of Lords). Thus, it seems clear that the British Courts would be prepared in the McClain situation, if they found that the law of Mexico had declared the property involved to be government property to permit the recovery of such property.

Further, in addition to the Ortiz case and the King of Italy case, we would like to draw attention to the examples we have referred to in the Answer to Question 1 of the First Series of Questions, particularly in the field of Treasure Trove, where the government title has been recognized and governments have succeeded in making recoveries. Also in that Answer we pointed out that under common law and other systems of law vesting of title to undiscovered property, not on government sites, is effective and not unusual; further, that normally the title to such vested property is not questioned when it comes into another jurisdiction. Thus, other cases like McClain may be expected.

QUESTION

"3. It is my understanding that theft under the common law and American statutory law requires proof of an actual taking of something from the rightful possession of another. McClain departs from that. Why do you call McClain consistent with long standing common law principles?"

ANSWER

We have already tried in our answer to Queston 1 of the First Series of Questions to indicate that the McClain decision accorded with common law principles in that the common law (as well as other systems of law) permit the vesting of title by a state to property even in a situation where the state does not have a possessory interest in the property and the state does not own the site involved.

As regards the McClain case and the common law of theft we wish to point out that the statute involved is the NSPA which deals with "stolen" property. It is our understanding that neither "stealing" nor "theft" is defined under the common law. "Larceny" is a common law crime which appears to be historically limited to taking of property from a person's physical possession. Moreover, in the case of the NSPA, Congress used the word "stolen" and the courts have held, and properly so it seems, that Congress did not mean to restrict the coverage to common law larceny. On the other hand, it is quite clear from the examples given in the Answer to Question 1 of the First Series of Questions that in the related field of Treasure Trove, in common law and non-common law countries, the taking by an individual of property belonging to the government, but not in the government's possession or on a government site, is considered a species of theft, stealing, embezzlement, etc. These examples would therefore appear to support the interpretation that has been made of the NSPA.

QUESTION

"4. Does the Archeological Resources Protection act apply to cultural artifacts excavated from private lands, or does it apply only to public and Indian lands? Do foreign decrees, such as the Mexican decree in McClain apply only to public lands or to artifacts taken from private lands as well?"

ANSWER

The Archeological Resources Protection Act of 1979 applies only to public and Indian lands. However, as we pointed out in our answer to Question 2 of the First Series, the Indian lands involved are lands which might be owned by an individual Indian or by an Indian tribe. The Act asserts the U.S. title for lands owned by the U.S. and asserts the Indian title for lands owned by an Indian individual or an Indian Tribe. While it is impossible to generalize about foreign laws, the Mexican law at issue in McClain applies to all pre-Columbian artifacts and remains, wherever found. See also our answers to Questions 1 and 4 of the First Series of Questions.

QUESTION

"5. Under the law of Mexico, can a private party legally own (as opposed to possess) pre-Columbian artifacts?

ANSWER

Article 27 of the 1972 Federal Law on Archaeological, Artistic and Historic Monuments and Zones states that moveable and immovable archaeological monuments, defined as the products and remaing of cultures antedating the arrival of the Spanish, are the inalienable and imprescriptible property of the Mexican Nation.

Senator LAXALT. Thank you very kindly, Mr. Maurer.

Richard Abbey, chief counsel of Customs.

Mr. ABBEY. Thank you, Mr. Chairman. I am pleased to have the opportunity to offer the views of the Customs Service on S. 605. I ask that my complete statement be submitted into the record and I will just address those small portions of it that deal with the Customs Service responsibilities.

Senator LAXALT. Your statement will be so filed. We thank you.

STATEMENT OF RICHARD H. ABBEY

Mr. ABBEY. The U.S. Customs Service is responsible at the borders for enforcing many laws and regulations on its own behalf and on behalf of over 40 other Federal agencies.

It is therefore to be expected that Customs will discover violations of the National Stolen Property Act in connection with importations of works of art and rare archeological and ethnological articles.

Frequently, to mask the theft, these items are also falsely declared or undervalued, in violation of U.S. customs laws.

In order to carry out its responsibilities, customs officers carefully inspect art and artifacts entering the United States, especially those articles originating in Latin America. Items may be initially detained because customs officers are unsure whether a U.S. law is being violated or because the officer suspects that the articles are undervalued, misdeclared, or otherwise imported contrary to U.S. customs laws.

Because customs officers are not art or archeology experts, they must rely on recognized experts to identify the article and verify its description and value. If it is identified as a pre-Colombian item being imported in violation of U.S. law, it is detained or seized, as appropriate.

Senator LAXALT. How much of that actually occurs?

Mr. ABBEY. Well, we had a flurry of activity back in 1981 and 1982. Since that time, there have been very few seizures or detentions.

Senator LAXALT. What is the reason for the lessening of these activities?

Mr. ABBEY. Well, I am sure it would be argued that the application of the *McClain* decision and our decision, in some instances, to detain articles where a country has claimed title to them and transmit them to the Justice Department to start an interpleader action to determine the rightful owner to the property, may have chilled importations.

Senator LAXALT. How does this work as a practical matter? Let us assume that I am traveling with a group of my colleagues and we are in some remote village in Peru and my wife picks up an artifact and we come into Customs, say, in Los Angeles.

Are your agents properly attuned to question whether or not that is being imported legally or illegally?

Mr. ABBEY. Yes. The inspectors would ask how the article was obtained and where it was obtained. If it was a country with whom we have an international agreement and the article was more than

a small relic and was declared—and in some instances not declared—but appeared to be a valuable article, they would detain it.

Senator LAXALT. Do you have experts on the spot that make those kinds of judgments?

Mr. ABBEY. No, we do not.

Senator LAXALT. What do you do, call in experts, then?

Mr. ABBEY. Yes, that is exactly right. We have called in experts to look at the article and give us an opinion.

Senator LAXALT. How often does that type of thing occur as a practical matter?

Mr. ABBEY. As a practical matter, it occurs very infrequently.

Senator LAXALT. Most of this activity, I would imagine, would be illegal in character and they certainly would not be coming through Customs, would they, or would they?

Mr. ABBEY. They have in the past. As I say, there has not been much activity.

Senator LAXALT. You mean mistakenly? Would they knowingly bring in through customs an illegally obtained object?

Mr. ABBEY. Knowingly. The last major case that we had was identified right here at Dulles Airport where a major collector/dealer had brought in Peruvian art and artifacts worth hundreds of thousands of dollars and had misdeclared the items. He was subject to prosecution under the National Stolen Property Act, although there was never an indictment of the individual. He ultimately pled guilty to a misdemeanor, I believe, and, through a settlement agreement, returned a good portion of the art and artifacts to Peru.

Senator MATHIAS. If I could follow up with a question, suppose Mrs. Laxalt is in Cuzco and she sees an object of Peruvian art, but Senator Laxalt, having been conditioned by this hearing, says, oh, no, we had better not buy that because importing it into the United States would be prohibited.

Now, what happens, as a practical matter, to that piece of pre-Colombian or Peruvian art? Does it stay in Cuzco or does some Japanese or some British or some German collector pick it up?

Mr. ABBEY. I would have to defer to my colleagues with respect to that question. I have no knowledge.

Mr. MAURER. Well, we have——

Senator MATHIAS. The purpose we are talking about here is protecting the country of origin. Is that purpose achieved, or is all that has really happened is that Mrs. Laxalt has been frustrated in her desire to own this particular artifact?

Mr. MAURER. Well, there are many different situations, but we do know, for instance, that some countries have a specialty. I am not sure that the Japanese have any specialty in Peruvian art. I think we do have such a specialty.

Therefore, if we are able to cut off the American market, we do a considerable bit in restricting the flow of that particular commodity. And I think what we have to do and are continuing to do is to try to get other countries on board, but a start has to be made someplace and we in that particular respect, I think, are the major market for this kind of art.

The self-abnegation of Mrs. Laxalt will have a beneficial effect, I believe.

Senator LAXALT. Are you satisfied, Senator Mathias?

Senator MATHIAS. I am not sure where the artifact is going to end up. You say it may stay there unless——

Mr. MAURER. Yes, it may stay there because I am not so sure the Japanese are interested in Peruvian art.

Senator MATHIAS. I think, however, there is some interest in Peruvian art in Europe.

Mr. MAURER. Yes.

Senator MATHIAS. And there are a good many collectors in Europe.

Mr. MAURER. Yes, but we are the dominant market and it is true that what we do has a ripple effect.

Mr. KNAPP. I might add to that. I have been informed that in the United Kingdom, the major organizations in the art trade are adopting a code of practice under which they undertake not to deal in stolen or illicitly exported art.

Senator MATHIAS. Is that as interpreted in the *McClain* decision?

Mr. KNAPP. No, but it would have the same practical effect because we are talking about illicitly exported art.

Senator LAXALT. Continue, Mr. Abbey.

Mr. ABBEY. Thank you.

If the expert we call in indicates that the article is not prohibited by our law but is from another country which claims ownership of the item, the embassy of the concerned country is notified, usually through the cultural attache.

If the foreign country claims ownership but the importer was unaware of the foreign law, no criminal charges are brought against the importer. If the importer was aware of the foreign law, the artifacts are detained under the National Stolen Property Act and the matter is referred to the U.S. attorney for prosecution.

S. 605 seeks to overturn this application of the National Stolen Property Act by carving out an exception for archeological and ethnological materials taken from a country claiming title in a declaration of ownership where the alleged theft is based on an export in violation of that country's law.

The Customs Service does not support S. 605 for several reasons. As it is presently drafted, S. 605 would be almost impossible to enforce because of definitional problems. First, the phrase "declaration by the foreign country of national ownership" is ambiguous. Does it refer to a statutory enactment, a constitutional provision, an executive decree, or a court decision?

Second, what does "other acts which amount only to a functional equivalent of a declaration of national ownership" cover? No examples are offered and we are unable to determine the acts to which the phrase applies.

Third, the bill would remove from the purview of the National Stolen Property Act an alleged stealing "based only upon an illegal export." It is likely that this clause would negate the intent of the drafters since most foreign laws base the stealing on the illegal removal of the artifact from the archeological site.

Subsequent acts merely involve further illegal sales. Since the original grave robber was a thief, he could not pass good title and the subsequent purchases never obtained valid title.

Fourth, the bill, in section 1, paragraph (3), grants immunity to persons knowingly violating foreign laws, some of which are similar to U.S. laws, and sends signals to unscrupulous persons that the United States will provide a ready market for their illicit wares.

Fifth, the definition of "archeological or ethnological material" which would be added to 18 U.S.C. 2311, based as it is on the Unesco legislation which seeks to prohibit illicit trade, is impossible to use in this context. When is something of archeological or ethnological interest? Who determines whether the object is of cultural significance?

Moreover, this application of the term "cultural significance" would have the ironic outcome of continuing to punish as a felony illegal trade in culturally insignificant artifacts, but allowing the illegal trade in the more important artifacts to flourish.

Thus, this legislation, if it were enacted, would protect those who knowingly and willfully violate foreign law by exporting the most important historical and cultural objects of a nation.

The law as drafted would be difficult to enforce because of the definitional problems mentioned and could result in absurd, unjust prosecutions.

Thank you. I will be happy with the rest of the panel to answer any questions.

Senator LAXALT. Thank you, Mr. Abbey.

[Prepared statement follows:]

STATEMENT OF
RICHARD H. ABBEY
CHIEF COUNSEL
U.S. CUSTOMS SERVICE
BEFORE THE
SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIMINAL LAW

Mr. Chairman and members of the Committee:

I am pleased to have the opportunity to offer the views of the Customs Service on S. 605 "To amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archeological material."

S. 605, if enacted, would overturn the decisions of the United States Court of Appeals for the Fifth Circuit in U.S. v. McClain 545 F.2d 988 (1977) and 593 F.2d 658 (1979). The McClain decisions held that an individual is guilty of violating the National Stolen Property Act (18 U.S.C. 2314, 2315) when he takes artifacts out of a country which claims title to the artifacts and then transports them into the United States knowing that the foreign country claims ownership and that his actions are illegal under the foreign law. The McClain decisions do not apply to the transportation of artifacts where the foreign country merely forbids or controls their exportation but does not by law claim title to them, title remaining in private hands.

Many countries are concerned over the pillage of their patrimony and have enacted laws which seek to control the trade in archeological and ethnological art and artifacts. Some countries, such as Peru and Mexico, have enacted laws in which the government claims title to all unexcavated pre-Columbian (pre-1500) artifacts. In this regard, I should note that the United States has enacted similar legislation with respect to artifacts which are found on Indian and Public lands. Some countries permit residents to possess these items but strictly control their export. To assist other countries of the world in preserving their heritage, the United States has taken the following steps during the last 15 years:

In 1971, the United States and Mexico entered into a Treaty of Cooperation Providing for the Recovery and Return of Stolen Archeological, Historical and Cultural Properties.

In 1972, in response to the concerns of many Latin American countries, the United States prohibited the importation of Pre-Columbian monumental or architectural sculpture or murals which were not accompanied by a certificate from the country of origin permitting their exportation.

In 1981 and 1984, the United States entered into executive agreements with Peru and Guatemala, respectively, modeled after the treaty with Mexico.

In 1983, Congress enacted legislation to implement the UNESCO Convention on Cultural Property.

The United States Customs Service is responsible at the borders for enforcing many laws and regulations on its own behalf and on behalf of over 40 other Federal agencies. It is therefore to be expected that Customs will discover violations of the National Stolen Property Act in connection with importations of works of art and rare archeological and enthological articles. Frequently, to mask the theft, these items are also falsely declared or undervalued in violation of U.S. Customs laws.

In order to carry out its responsibilities, Customs officers carefully inspect art and artifacts entering the United States, especially those articles originating in Latin America. Items may be initially detained because Customs officers are unsure whether a U.S. law is being violated or because the officer suspects that the articles are undervalued, misdeclared or otherwise imported contrary to U.S. Customs laws. Because Customs officers are not art or archeology experts, they must rely on recognized experts to identify the article and verify its description and value. If it is identified as a pre-columbian item being imported in violation of U.S law it is detained or seized as appropriate. If, however, the expert indicates it is not prohibited by our law but is from another country which claims ownership of the item, the embassy of the concerned country is notified (usually through the cultural attache). If the foreign country claims ownership but the importer was unaware of the foreign law, no criminal charges are brought against the importer. If the importer was aware of the foreign law, the artifacts are detained under the National Stolen Property Act and the matter referred to the United States Attorney for criminal prosecution.

S. 605 seeks to overturn this application of the National Stolen Property Act by carving out an exception for archeological and ethnological materials taken from a country claiming title in a declaration of ownership where the alleged theft is based on an export in violation of that country's law. The Customs Service does not support S. 605 for several reasons.

In general, we believe it is an unwise precedent to carve out exceptions to general criminal statues for certain types of goods. In addition, S. 605, as it is presently drafted would be almost impossible to enforce because of definitional problems.

First, the phrase "declaration by the foreign country of national ownership" is ambiguous. Does it refer to a statutory enactment, a constitutional provision, an executive decree or a court decision?

Second, what does "other acts. . . which amount only to a functional equivalent of a declaration of national ownership" cover? No examples are offered and we are unable to determine the acts to which the phrase applies.

Third, the bill would remove from the purview of the National Stolen Property Act an alleged stealing "based only upon an illegal export". It is likely that this clause would negate the intent of the drafters, since most foreign laws base the "stealing" on the illegal removal of the artifact from the archeological site. Subsequent acts merely involve further illegal sales, since the original "graverobber" was a thief, he could not pass good title and the subsequent purchasers never obtain valid title.

Fourth, the bill in Section 1, paragraph (3) grants immunity to persons knowingly violating foreign laws (some of which are similar to U.S. laws) and sends signals to unscrupulous persons that the U.S. will provide a ready market for their illicit wares.

Fifth, the definition of "Archeological or ethnological material", which would be added to 18 U.S.C. 2311, based as it is on the UNESCO legislation which seeks to prohibit illicit trade, is impossible to use in this context. When is something of archeological or ethnological "interest?" Who determines whether the object is of "cultural significance?" Moreover, this application of the term "cultural significance" would have the ironic outcome of continuing to punish as a felony, illegal trade in culturally insignificant artifacts, but allowing the illegal trade in the more important artifacts to flourish.

Thus, this legislation, if it were enacted, would protect those who knowingly and willfully violate foreign law by exporting the most important historical, cultural objects of a nation. The law, as drafted, would be difficult to enforce because of the definitional problems mentioned and could result in absurd, unjust prosecutions.

Senator LAXALT. Senator Mathias.

Senator MATHIAS. I think Mr. Abbey raises an interesting question. How do you determine actual national ownership? That probably does need some explanation. Mr. Knapp, do you have any view on that?

Mr. KNAPP. Well, in a particular prosecution we presumably would call, as we did in the *McClain* case, an official from Mexico to come in and testify as to what the state of the law was, and then we would proceed from that point.

We would still have the difficult burden of establishing——

Senator MATHIAS. It was a difficult problem in the *McClain* case.

Mr. KNAPP. Yes, it was extremely difficult.

Senator MATHIAS. What about the provisions of common law concerning treasure which are applicable in Britain and in countries that have recognized common law?

Mr. MAURER. Well, I understand that the British have, in fact, a case comparable to the *McClain* case where they held that the vesting of title by a particular government created ownership in that government, and therefore when a suit was brought for recovery, that ownership was recognized.

I believe you will find that that would be the reaction of most countries with a common law jurisprudence and even with a civil law jurisprudence.

Senator MATHIAS. Could you provide the committee with a citation of that case?

Mr. MAURER. I will try to do so.

Senator MATHIAS. And, if possible, a copy of the opinion?

Mr. MAURER. I will try to do so.

Senator MATHIAS. If you give us the citation, maybe we can find it.

Mr. MAURER. Let me try to find it first and provide it to the committee.

[The following was subsequently supplied for the record:]

See *Attorney General of New Zealand* v. *Ortiz* [1982] 3 All. E.R. 432 (Q.B.), particularly at p. 450, citing *King of Italy* v. *Marquis Cosimo di Medici Toranquinci* (1918) 34 TLR 623. The *Ortiz* decision was reversed by upper courts on the basis that New Zealand had in fact not taken title because the forfeiture statute involved was worded prospectively and only made the art object in question "liable to forfeiture". See *Attorney General of New Zealand* v. *Ortiz* [1982] 3 All. E.R. (Ct of Appeal); [1983] 2 All. E.R. 93 (House of Lords).

Senator MATHIAS. Mr. Maurer, you and Senator Moynihan are in about as complete disagreement on this subject as any two people I have ever heard testify in this room, and I have heard a lot.

He says in his statement that in the waning days of the 97th Congress, the Finance Committee obtained a compromise agreement between many government and private interests, including the State Department, the Customs Service, the Justice Department, museum officials, archeologists and art dealers.

You say that you were never, ever in agreement?

Mr. MAURER. Yes. I would like to reiterate that and substantiate it, if I may. I was one of the parties who participated in it. Mr. Weglian, under Mr. Knapp, participated. Mr. Seidel, under Mr. Abbey, participated. Mr. Ing of Senator Matsunaga's staff partici-

pated. Mr. Stewart of the USIA participated in all the deliberations.

And I think we are all prepared to say that we made quite clear to Mr. Ing, who was acting as a spokesman, that we were not committing ourselves to support the *McClain* legislation. We opposed the introduction of that legislation for inclusion of that legislation in the particular Cultural Property Implementation Act.

And in that connection I would like to refer you to an article that has been written by a Ms. Barbara Rosecrauce of the Cornell Law School, a former assistant professor of English, but now at the law school, who made a survey of this matter and submitted her article to Ms. McKittrick and had hoped to testify here as to what the facts were. But Ms. McKittrick advised her that there was no time for her to testify.

But the article is going to be included, I understand, in the record.

Senator LAXALT. It is.

[Article follows:]

HARMONIOUS MEETING:

THE McCLAIN DECISION AND THE CULTURAL PROPERTY IMPLEMENTATION ACT

Barbara Rosecrance
Cornell University Law School
March 21, 1985

INTRODUCTION

In recent years a burgeoning illicit trade in art has sparked the global pillage of archaeological sites.[1] After a decade of opposition from art dealers,[2] Congress passed the Cultural Property Implementation Act (CPIA)[3] in December 1982, to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Ownership of Cultural Property (UNESCO Convention).[4] Under the CPIA, the United States agrees to join other art-importing nations in levying import controls over archaeological and ethnological materials that are in jeopardy from pillage.[4] In an emergency, the United States may impose controls unilaterally.[5]

The United States may also enter bilateral agreements with the requestion nation.

With the passage of the CPIA, a new issue has arisen. U.S. art dealers, their legal representatives and Senator Daniel Patrick Moynihan, claim that the 1977 construction of an existing U.S. statute, the National Stolen Property Act (NSPA), is inconsistent with U.S. law, and with the Cultural Property Implementation Act and the aims of the UNESCO Convention.[6] In United States v. McClain, the U.S. Court of Appeals for the Fifth Circuit applied the NASPA to a group of defendants who had smuggled pre-Columbian articles from Mexico.[7] The NSPA imposes criminal liability on anyone who transports stolen property in inter-state or foreign commerce, knowing it is stolen.[8] The court held that the NSPA applied where a nation had by law clearly declared objects to be government property, and where export regulations also forbade their removal from the country.[9] Senator Moynihan has sponsored legislation to remove cultural property from the reach of the NSPA.[10] The Criminal

Law Subcommittee of the Senate Judiciary Committee will hold hearings on the bill to repeal McClain, in May, 1985.[11]

This note will show that the McClain construction of the NSPA is fully consistent with U.S. law, and with the CPIA and the UNESCO Convention. Section I briefly describes the problem of pillage and summarizes U.S. efforts to control the illicit art trade. Section II presents the McClain holding and the Moynihan bill to repeal McClain. Section III analyzes and rebuts the arguments of Senator Moynihan and commentators that McClain is inconsistent both with U.S. law and with congressional policy in the CPIA, and that the U.S. Customs Service and the State Department are enforcing McClain and other U.S. initiatives in contravention of the CPIA. Section IV explores the value of McClain as it articulates U.S. policy and aids U.S. efforts to control the theft of art. This section emphasizes the harmony of the NSPA with U.S. policy. Finally, the Note discusses a recent U.S. statute, the Archaeological Resources Protection Act of 1979, which provides a domestic counterpart to the foreign ownership laws recognized under McClain, and which interacts with the NSPA to help control the increasing pillage of U.S. Indian sites.[12]

I. BACKGROUND

A. THE PROBLEM OF PILLAGE

The illicit trade in art has reached crisis proportions. Described in a recent news article as "a blitzkrieg on historical sites around the world," this vandalism may soon strip all known archaeological sites around the world to feed a multi-million dollar market "that subsidizes looting despite an array of federal, state, and international laws" which prohibit this plunder.[13] Scholars calculate that the United States accounts for at least half the market for pre-Columbian art, nearly all of which has been smuggled from Mexico, Central America, and the Andean republics of South America.[14] As Karl Meyer warned in The Plundered Past,

> For the first time in our history we face the novel prospect of a future without a past. Given the present tempo of destruction, by the end of the century all unexplored major archaeological sites may be irrevocably disfigured or ravaged. We are

> witnessing the equivalent of the burning of the library at Alexandria by the Romans, the catastrophic bonfire in which much of the wisdom of antiquity was consumed in flames. One can see most of the ingredients of the conflagration in the relentless demolition of pre-Columbian sites. . . .[15]

Efforts to curb pillage and regulate the art trade must balance between competing values.[16] To preserve the cultural heritage of past civilizations is of universal aesthetic and intellectual importance and is a major concern of the countries where art originates. The "cultural nationalism" of those countries, who sometimes try to protect themselves from looters by sweeping export controls and declarations of national ownership, conflicts with the desires of dealers for a free international market in art and with the aesthetic, scientific, and educational values of international circulation and exchange.[17]

The United States, in its efforts to control the illicit trade in art, has attempted to maintain a balance between these competing values of preservation and trade, but until recently, the dealers have had the benefit of the balance, because existing regulations and remedies were limited or difficult to implement. Now, however, the situation is changing. First, through the CPIA the United States may be able to control the import of specified categories of endangered archaeological or ethnological materials. Secondly, the U.S. Customs Service is applying the McClain construction of the NSPA to pre-Columbian art that crosses the U.S. border. These two initiatives have provoked the claims of U.S. dealers that the NSPA is inconsistent with the CPIA and have engendered the bill to repeal McClain.

B. U.S. EFFORTS TO REGULATE THE ILLICIT ART TRADE

The United States attempts to control the illicit art trade through municipal and international remedies. Civil suits under state law (in state or federal courts) may accomplish the recovery of stolen property. In these actions the plaintiff must prove ownership: if goods are stolen the original owner will prevail. Traditional property laws apply, involving concepts of title, bona fide purchasers for value, and conversion. Civil action is at best slow, ponderous, and expensive.[18] Four U.S. statutes also help

control the importation of cultural property.[19]

Besides municipal laws, bilateral agreements and an international treaty regulate cultural property. A 1972 treaty with Mexico and a 1981 Executive Agreement with Peru obligate the U.S. to help those countries recover stolen property through existing U.S. civil and criminal law.[20] A similar agreement now exists with Guatamala, and an agreement with Equador is near completion.[21] Through passage of the CPIA, the United States is now a member of the UNESCO Convention.[22]

C. NATIONAL LEGISLATION

1. The Pre-Columbian Act of 1972

Passage of the Pre-Columbian Act represented a unilateral initiative by the United States to stop the dismemberment of monumental pre-Columbian stelae.[23] Unlike state property laws or national criminal law, the legislation does not require that the pre-Columbian monumental or architectural sculptures or murals to which it applies be stolen, only that they be "subject to export control by the country of orgin." Failure to produce an export certificate results in seizure at the border.[24]

2. The National Stolen Property Act

In the United States v. McClain, the Fifth Circuit applied the NSPA to goods stolen from a foreign country and defined the requirements for national ownership.[25] The NSPA prohibits the transportation "in interstate or foreign commerce of any goods, wares, or merchandise of the value of $5000 or more," with knowledge that such goods were "stolen, converted or taken by fraud."[26] The NSPA expanded an earlier laws, the National Motor Vehicle Theft Act, to all tangible property and rests on the same foundation.[27] The earlier Act arose because modern transportation facilitated illegal interstate activity and made federal action necessary to enforce laws against motor theft; the legislation was directed at tangible chattels; "stealing" meant removal of property from its owner.[28] Similarly, the need for federal action to control the movement of stolen goods in interstate and foreign commerce underlies the NSPA, which applies to "all goods."[28]

3. The Cultural Property Implementation Act

The CPIA implements articles 9 and 7(b) of the UNESCO Convention.[30] Under Article 9 the parties undertake "concerted international action" to help a party whose "cultural patrimony is in jeopardy from pillage of archaeological or ethnographic materials."[31] Article 7(b) prohibits import of cultural property stolen from a museum or similar institution.[32] The CPIA's ~~two~~ Two of major provisions apply only to archaeological or ethnographic materials and respond to situations of jeopardy or emergency.[33] Under the first of these provisions, once the United States finds that these materials are in jeopardy from pillage, it ~~must~~ may act in concert with other art-importing countries to impose import controls.[34] The second major provision allows the United States to impose controls unilaterally in an emergency.[35] A ~~C~~cultural ~~P~~roperty Advisory Committee assists the President in his determination of the conditions permitting ~~either~~ multinational, bilateral, or unilateral action.[36] In addition ot the provisions that cover archaeological or ethnological materials, the Act tracks Article 7(b) of the UNESCO Convention by prohibiting the importation of all cultural property stolen from a museum, religious or secular monument, or similar institution.[37]

The CPIA seeks both to preserve national partrimony and to promote legitimate trade. In this it balances the interests of dealers with those of the archaeological, government, and museum communities.[38] The Act's central provision enunciates four requirements for Presidential authority to act: that the requesting party's cultural patrimony is in jeopardy; that the affected state has tried to help itself; that import controls will be of substantial benefit and less drastic remedies are not available; and that ~~U.S. import controls be applied in concert with similar restrictions by the other art-importing nations.~~ (if other nations are major markets for the endangered materials, the United States will levy import controls in concert with them.)[39] If other such nations do not act similarly, the United States may suspend its import controls.[40] The requirement for multilateral action responds to the concern of dealers that ". . . if we adopt stringent legislation, the art market will simply shift elsewhere, to Europe or Japan. . . ."[41]

Yet significantly, the CPIA permits U.S. action even in the absence of parallel controls by other art-importing nations. The Act's emergency provision allows the United States to respond unilaterally where archaeological or ethnological material is (1) newly discovered and of importance for the understanding of the history of mankind, and is in jeopardy from pillage, dismantling, dispersal, or fragmentation; (2) from a site of high cultural significance and one which is in jeopardy of crisis proportions; or (3) part of the remains of a culture or civilization whose record is in jeopardy of crisis proportions.[42] Application of import restrictions must reduce the incentive for pillage, dismantling, dispersal, or fragmentation.[43] The emergency controls are temporary, but they may run for five years with a three year extension possible.[44]

II. NSPA AND CPA: BASES OF THE CONTROVERSY

A. THE NSPA AND THE McCLAIN DECISION

1. Facts

In United States v. McClain, the U.S. District Court for the Western District of Texas convicted five defendants of conspiring to transport, receive, and sell assorted stolen pre-Columbian artifacts in interstate commerce in violation of the NSPA.[45] The defendants had negotiated the sale of these objects with an undercover F.B.I. agent; they knew export was illegal and violated Mexican ownership law.[46] In McClain I, the Court of Appeals for the Fifth Circuit reversed the convictions because an inaccurate instruction could have prejudiced the jury as to the defendant's knowledge of Mexico's ownership.[47] Knowledge (scienter) is essential to conviction under the NSPA.[48]

On appeal, another Fifth Circuit panel found that the defendants clearly knew the goods belonged to the Mexican government and convicted the defendants of conspiracy to violate the NSPA.[49] McClain II followed the McClain I holding that the NSPA applies to government-owned property and explained more fully its basis and requirements.[50]

2. The McClain I Holding

Writing for the Fifth Circuit, Judge Wisdom held that the NSPA properly applies to illegal exportation of artifacts which Mexican law has declared to be the property of the nation. The court held that "a declaration of national ownership is necessary before illegal exportation of an article can be considered . . . stolen within the meaning of the NSPA," and that "such a declaration combined with a restriction on exportation without consent of the owner is sufficient to bring the Act into play."[51] The court construed "stolen" to denote "any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership."[52] Further, the court distinguished ownership from possession: "possession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law."[53] Government restrictions on export refer to possession and derive from the government's power to regulate, which is not ownership: "The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty."[54] Violations of export restrictions alone therefore do not constitute theft under the NSPA. Only a "clear and unambiguous declaration of ownership by the government, together with export restrictions, activates the U.S. statute.[55]

B. THE MOYNIHAN BILL

Senators Robert Dole, Spark Matsunaga, and Moynihan sponsored the bill to repeal McClain on September 28, 1982, the last day of the 97th Congress.[56] Reintroducing this bill March 6, 1985, Senator Moynihan attacked the McClain decision as "flatly inconsistent with traditional American jurisprudence;" as "inconsistent with a basic principle of the UNESCO Convention implementing legislation--namely, that U.S. participation in controlling the international movement of cultural properties shall primarily be part of a concerted international effort;" and as turning "on the meaning of foreign law (largely unavailable in translation) and on legal concepts alien to

American common law."[57] The Moynihan bill proposes to rectify this situation by amending the NSPA as follows:

> Be it enacted . . . that sections 2314 and 2315 of title 18, United States Code, are amended by adding at the end of each the following:
>
> "This section shall not apply to any goods, wares, or merchandise which consists of archaeological or ethnological materials taken from a foreign country where--
> "(1) the claim of ownership is based only upon--
> "(A) a declaration by the foreign country of national ownership of the material; or
>
> "(B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership;
> "(2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and
> "(3) the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowedge of the claim of ownership described in clauses (1)(A) and (B)."[58]

III. ANALYSIS: THE CONSISTENCY OF McCLAIN AND THE CPIA

A. THE McCLAIN CRITICISMS SUMMARIZED

Senator Moynihan and other critics believe that under McClain the NSPA is inconsistent with the CPIA and with the aims of the UNESCO Convention.[59] Supporters of the Moynihan bill regard the definition of stolen property under the NSPA as a legal concept "alien to American common law."[60] Therefore, they assert, application of the NSPA to the illicit importation of archaeological and ethnological materials has no basis.[61] These critics equate ownership with possession, considering that "stolen" applies only to the taking of property without payment from an owner who has a possessory interest.[62] They believe that McClain accepts "a blanket legislative declaration of state ownership . . . without more," and that under the NSPA, adoption of this declaration transforms illegal export to theft.[63] The commentators also criticise McClain on the ground that in accepting another country's definition of ownership, the NSPA turns on the meaning of foreign law rather than on U.S. policy.[64]

From McClain's "absence of foundation," the critics argue that McClain is inconsistent with the CPIA and the aims of the UNESCO Convention because in unilaterally responding to the ownership

declarations of foreign countries, the NSPA rejects "the basic principle of CPIA," that U.S. participation in efforts to control pillage will be part of a concerted international effort.[65] The commentators criticise U.S. Customs Service enforcement of the NSPA and of other U.S. statutes and agreements as inconsistent with the principle of participation in an international effort and accuse the Customs Service of exceeding its statutory authority.[66] They consider that Customs policy on art imports "thwarts the goals which the United States sought to advance in the UNESCO Convention" by reinstating that "blank check" approach under which parties to the Convention would enforce unconditionally the export laws of other countries. The United States successfully opposed this policy in the UNESCO Convention and rejected it in the CPIA.[67] Senator Moynihan goes even farther than other critics to argue that not only does the Customs Service, in adopting McClain, act contrary to the CPIA, but that the U.S. bilateral agreements with foreign countries are themselves inconsistent with the CPIA.[68]

Finally, Senator Moynihan claims that all parties to the passage of the CPIA agreed that McClain would be repealed and that all the interests concerned, private and public, committed themselves to this understanding: "(e)nactment of (CPIA) and repeal of McClain were a package."[69]

B. THE MCCLAIN DECISION: INTERNAL CONSISTENCY AND U.S. LAW

1. McClain's Puzzling Interpretation

The McClain court held that property stolen from a foreign government, like property stolen from a private owner, is within the protection of the NSPA. Senator Moynihan rejects "this puzzling new judicial interpretation of stolen" as inconsistent with "established common law."[70] The meaning of "stolen" is easily clarified. For as the McClain court noted, the Supreme Court in United States v. Turley held that "the word 'stolen' has no accepted common law meaning and is not a term of art."[71] In Turley, which is still controlling, the Supreme Court interpreted "stolen" broadly, citing with approval two NSPA cases, one, Crabb v. Zerbst, a Fifth Circuit decision.[72] The Crabb court held that

> Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership.
> . . . The aim of the statute (NSPA) is, of course, to prohibit the use of interstate transportation facilities for goods having certain unlawful qualities.[73]

In another pre-McClain case, Lyda v. United States, the Fifth Circuit quoted Crabb and another Fifth Circuit opinion, Edwards v. Bromberg, which interpreted stolen as "a word of general and broad connotation, intended to cover and covering any criminal appropriation of another's property to the use of the taker . . ."[74] McClain relied on the controlling Turley usage and affirmed the subsequent broad readings in Lyda and Bromberg.[75]

McClain's reading of "stolen" can hardly be inconsistent with established common law where, as the Supreme Court and earlier circuit courts indicated, no common law definition existed. In following the controlling definitions, McClain's reading was fully consistent with precedent. Furthermore, to the degree that the series of broad readings create a common law usage of "stolen," McClain follows the evolving common law. But whether regarded simply as adopting the definition of its precedents or as a marker on the road of developing common law, McClain does not make new law: it merely applies well-settled principles and definitions.[76]

The history of "stolen" after McClain upholds the term's construction. In United States v. Smith, the Fifth Circuit, excepting a copyright violation from the broad reach of "stealing" under section 2314, cited a 1978 Second Circuit case to emphasize that stealing is "essentially an offense against another person's proprietary or possessory interests in property."[77] Finally, in United States v. Gallant, the Court cited Smith to emphasize that in its definitions "the statutory language 'stolen' and 'converted' covers a broad range of illegal acquisition and use of another's property," and that the phraseology used by Congress, "stolen, converted, or taken by fraud," is intended "to cover illegal acquisitions and uses comprehensively."[78]

2. Ownership vs. Possession

Senator Moynihan attacks the McClain decision for "substituting hollow declarations of foreign ownership for the time-tested requirement that an owner have had a real possessory interest in property before it can be considered stolen" and claims that such legal concepts are alien to American common law.[79] The McClain court asserted that "possession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law."[80] The subsequent NSPA cases uphold the McClain interpretation. Smith and Long Cove Seafood, in relying on the controlling Turley definition of "stolen," affirm that stealing violates a person's proprietary or possessory interests"; the cases cite McClain for additional support.[81] Furthermore, a government can be an owner. The McClain court recognized "the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is in its jurisdiction."[82]

U.S. laws also apply the concept of government ownership. An especially pertinent example is the U.S. Archaeological Resources Protection Act of 1979, under which the United States claims ownership of artifacts found on government or Indian lands.[83] Besides a national government, a state may own property or resources. Thus, in Geer vs. Connecticut, the U.S. Supreme Court affirmed that a state owns wildlife in its sovereign capacity.[84] In Long Cove Seafood, the Second Circuit emphasized that a state or town may be an owner.[85] Other recent decisions have upheld government ownership of alligators and mineral rights.[86] The McClain court's holding follows logically from the established legal principle that a government can own property. Thus, having found Mexico's 1972 statute to be an authoritative declaraction of ownership, the McClain II court held:

> Deferring to the legitimate act of another sovereign, we agree . . . that it is proper to punish through the National Stolen Property Act encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation.[87]

3. The Requirements for Ownership under McClain

Senator Moynihan and other critics of McClain believe that a property will be considered stolen under the NSPA "simply because a foreign country has passed a law declaring that it owns objects within its borders. . . "[88] One critic states that "a blanket legislative declaration of state ownership . . . without more, is an abstraction--it makes little difference in the real world. Yet McClain gives this abstraction dramatic weight. Illegal export . . . suddenly becomes theft."[89] But "blanket declarations" or "abstractions" do not meet the standards for government ownership under McClain. For legitimate ownership, the McClain court required "clear and unambiguous laws."[90] If a government's law is opaque, the NSPA cannot apply. The McClain court emphasized that the NSPA "cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature."[91] This requirement that a country's declaration of ownership be clear and unambiguous mandates at the threshold "sufficient clarity to survive translation into terms understandable by and binding upon American citizens."[92] A broad claim of national patrimony, such as a blanket declaration, will not constitute a valid ownership law. Furthermore, a clear, precise, and legal declaration of government ownership must coexist with restrictions on export.

4. Illegal Export and Theft

Under McClain, theft remains distinct from illegal export. Although export restrictions are a necessary correlative to a nation's declaration of ownership, to violate export restrictions in the absence of such a declaration does not constitute theft. This is a crucial point, because the mistaken belief that under McClain, the NSPA equates illegal export with theft, is the major argument against the McClain holding. As one critic phrases it, "(t)he key question remains whether excavations unauthorized by a foreign government constitute a 'theft' under the National Stolen Property Act. This is the controversial issue at the heart of the McClain decision."[94] On this question the McClain court was explicit:

> the state's power to regulate is not ownership . . . restrictions on exportation . . . do not create "ownership" in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.[95]

5. Enforcing Other Countries' Laws

Another criticism of the McClain holding is that a foreign country can invoke the legislation of the United States to help enforce its export rules "by simply waving a magic wand . . . ."[96] Or, as Senator Moynihan frames the argument, the NSPA turns on the meaning of foreign laws.[97] As the McClain court noted, the point is not whether U.S. sanctions under the NSPA will help the exporting country invoke its law, the point is whether U.S. law applies.[98] In regulating items that cross its border from a foreign country, the United States is applying its own law. A critic of McClain describes as the operative premise of our Customs law and policy, "that U.S. legislation properly describes what goods may be imported."[99] In forbidding the importation of stolen goods, the NSPA does precisely this. As the McClain court observed, "(i)t is no surprise, then, that the NSPA has been applied to thefts in foreign countries and subsequent transportation into the United States."[100]

Moreover, the NSPA is faithful to congressional intent to protect the owners of stolen property, whoever they are: "(t)he Republic of Mexico when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries."[101] In its application to interstate and foreign commerce, the NSPA articulates U.S. law. The statute does not "turn on the meaning of foreign laws, largely unavailable in translation"[102] Rather, the NSPA defines the conditions under which the United States will honor foreign ownership laws.

Furthermore, the NSPA mandates the stringent requirement of knowledge (scienter) for criminal liability: the defendant must know that a country has an ownership law and export restrictions before he can be considered to have stolen property from that

country.[103] To prove scienter is difficult. If foreign laws are ambiguous, scienter will be even harder to prove.[104] In addition, the government carries the burden of proof, which is the "beyond a reasonable doubt" criminal standard, a standard higher than that permitted in civil suits. Where doubt about scienter exists, as the McClain court noted, that doubt should be resolved in favor of lenity.[105] Like the standards of clarity and unambiguity which the U.S. imposes on foreign declaractions of ownership, the scienter requirement functions both as a limit on practical enforcement and as a safeguard that NSPA will not be applied illegitimately or overbroadly.

C. MCCLAIN AND THE CPIA: UNILATERAL RESPONSE VS. CONCERTED INTERNATIONAL EFFORT

1. McClain, Customs Enforcement, and Congressional Policy in the CPIA

Critics of the McClain decision believe that the NSPA is a unilateral response to the problem of pillage and therefore violates a basic principle of the CPIA, that U.S. participation in control of the illicit art trade should be part of a concerted international effort.[106] In this view, both the McClain decision and Customs enforcement of McClain and of other U.S. initiatives, are inconsistent with congressional policy in the CPIA.[107] The critics accuse the Customs Service of "supplanting the multinational effort authorized by the CPIA with a unilateral ban" under which Customs officials "merely enforce a foreign nation's bald declaration of ownership."[108] This reinstates the "blank check" approach which the United States repudiated in the UNESCO Convention and the CPIA.[109] The critics accuse the Customs Service of blanket detention of pre-Columbian art under the aegis of McClain and believe that Customs enforcement has created an embargo on pre-Columbian art.[110]

2. U.S. Regulation of Cultural Property: a Pluralistic Approach

The argument that the NSPA is a unilateral response which is inconsistent with congressional policies regarding the CPIA misreads congressional intent. U.S. policy on the regulation of cultural property includes unilateral, bilateral, and multilateral

approaches, as the NSPA, the Pre-Columbian Act, the bilateral agreements with Mexico, Peru, Guatemala, and Equador, and the CPIA illustrate. In their pursuit of the common goal of control of pillage, U.S. remedies overlap and diverge, but distinctions in scope and procedure are not inconsistency.[111] The Moynihan position assumes that Congress intended the CPIA to supersede the NSPA (and, as his recent speech suggests, the bilateral agreements).[112] In support of this view, Senator Moynihan further characterizes the understanding that led to passage of the CPIA as a commitment to repeal McClain.[113]

Congress has consistently maintained complementary approaches to the control of pillage. The 1982 Senate report approving the Cultural Property Bill specified that the CPIA does not alter existing remedies:

> . . . this bill reflects the approach to illicit trade in art adopted by the Congress in the Pre-Columbian Art Act of 1972 (Pub. L. No. 92-587) with regard to a particular category of artifacts. The bill takes into account the reservations and understandings accompanying the grant by the Senate in 1972 of its advice and consent. . . . Further, it neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which the provisions of this bill apply.[114]

The Senate Understanding that pertains to a CPIA provision refers to cultural property stolen from museums and provides that "(A)rticle 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties."[115] The 1982 Senate Report reiterates this understanding. Significantly, the Report goes farther than the earlier Understanding; it specifies that the CPIA does not supersede the NSPA.

> Implementation of article 7(b) of the Convention affects neither existing remedies available in State or Federal Courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (e.g., National Stolen Property Act, Title 18, Sections 2314-5). . . .

Senator Moynihan's belief that the CPIA is intended to replace the NSPA has no basis in the CPIA's legislative history.

Nor do other accounts support Senator Moynihan's view that all parties agreed to overturn McClain as the condition for passage of the CPIA. Representatives of public and private interests describe

an agreement to air the issues but not to support the repeal of McClain. Acting at Senator Matsunaga's request, his chief aide, Edward Ing, reached an understanding with Senator Moynihan's representative that as a quid pro quo for Senator Moynihan's agreement not to block the CPIA, Senator Dole (with Senators Matsunaga and Moynihan) would introduce a bill to repeal McClain. The constituencies made no commitment to support the bill.[117]

3. The CPIA's Unilateral Provision

Arguments that the NSPA is a unilateral response that opposes the multilateral requirement of the CPIA must confront the important unilateral aspect of the CPIA. For although the CPIA embodies the ideal of concerted international effort in its provision for multilateral controls, it also permits the United States to act unilaterally in an emergency, for a period of eight years.[118] Some commentators believe that the unilateral provision will prove to be the only effective mechanism of the CPIA.[119] This prediction awaits the event, but the existence and importance of CPIA's unilateral provision do not support a belief that the NSPA clashes with the CPIA.

D. THE REALITIES OF ENFORCEMENT

1. The NSPA and Blanket Enforcement

The critics charge that, under McClain, the NSPA and the Customs Service resurrect the "blank check" approach which the United States repudiated in the CPIA, by "an overbroad attempt to enforce all foreign ownership laws."[120] The "blank check" refers to sweeping enforcement of the export regulations of other countries.[121] But neither the mandate of the NSPA nor Customs enforcement supports this view. The doctrinal limits of the NSPA prevent blanket application. The Act applies to stolen goods, not to goods whose export is prohibited. Only where bona fide laws of ownership exist in combination with export restrictions does importation impose penal liability under the NSPA.[122] However, scienter must still be proved, and the standard of proof is high. The legal safeguards of the NSPA, the practical difficulties of

proof, and the costs of prosecution, insure that McClain does not give a blank check.

The commentators acknowledge that McClain can be valid in "clear and egregious cases."[123] This is logically inconsistent with the claim that McClain is "bad law," for prosecution in clear and egregious cases still rests on the basis of McClain's definitions and jurisprudence.[124] If that basis is sound, the law will apply. The McClain guidelines and limits insure that the NSPA will apply only in clear cases. Where provenance is unknown, the United States cannot prove theft. Where it is not clear that an object was exported after the effective date of a valid ownership law, the law will not apply. If laws are ambiguous or overbroad, they will not constitute valid declarations of ownership under U.S. law, and scienter will not be found.

Nor do the facts support fears that McClain will lead to indiscriminate enforcement of the NSPA. In the entire history of the NSPA, only two cases have applied that Act to stolen pre-Columbian art: United States vs. Hollingshead, which preceded McClain, and McClain itself.[125] Supporters of the bill to repeal McClain cannot present evidence that enforcement of McClain has led to widespread criminal prosecution under the NSPA.

2. U.S. Customs Enforcement and Congressional Policy

Senator Moynihan and others believe that a Customs Directive, issued in 1982, embodies a new policy, by which the U.S. Customs Service enforces the NSPA and other U.S. initiatives contrary to congressional policy.[126] Senator Moynihan suggests further that, besides McClain, the bilateral agreements themselves violate congressional policy.[127] The critics assert that the Customs Service has admitted it is on shaky legal ground; one commentator even accuses the Service of "bad faith" in implementing Customs policies under the NSPA while participating in passage of the CPIA.[128]

These attacks on the Customs Service mischaracterize both the basis on which Customs proceeds and what the Service actually does.

U.S. legislation properly describes what goods may be imported, and the Customs Service enforces U.S. laws. Its mandate includes the NSPA and other statutes: for example, Customs must seize improperly declared or undervalued items;[129] Customs may detain temporarily and appraise objects that may be stolen to ascertain their character and provenance.[130] Customs enforces the Pre-Columbian Act and will enforce future import controls under the CPIA.[131]

To the "blank check" charge, a high Customs official responds, "we do not and will not enforce other countries' export laws."[132] The Customs Service is unaware of an "embargo" on pre-Columbian art.[133] Customs does stop pre-Columbian monumental art under the Pre-Columbian Act. In other cases, Customs acts only if the country has a clear and precise law of ownership and if the object has been exported after passage of the law. THus, the Service detains pre-Columbian art from Mexico and Peru under the bilateral agreements. Where a bona fide ownership law exists in another country, Customs will notify the country so that it may make a claim. The Service sees no bar to this cooperation under U.S. law. If the country claims ownership and the importer disputes it, interpleader may be necessary. The Service considers prosecution under the NSPA only where evidence exists that the object is stolen.[134]

Most pre-Columbian objects that may be stolen violate the law against improper declaration; these objects have also been excavated recently, and they are not reduced to possession. Where genuine possession exists, the Service supports the payment of compensation to an innocent buyer. Furthermore, Customs does not detain objects on the basis of broad statutes which claim patrimony. The Service released objects from Guatemala and Colombia last year because their declarations of ownership did not constitute valid laws.[135] In fact the Customs Service has not been making many seizures of pre-Columbian art: a high official cites five detentions in 1984. Of these, the Service released one, instituted criminal prosecution of one because the objects were undervalued, two cases went to civil interpleader, and in one case the importer agreed to return the art.[136]

Officials defend the legality of Customs enforcement, noting that Customs does not make unilateral determinations but follows U.S. law in selecting what may be imported. The commentators who quote Customs as admitting it is "on shaky legal ground" relied on a New York Times article but did not mention that the newspaper retracted the statement next day.[140] Concerning "bad faith," an official reiterates that the CPIA was never intended to be the sole means of regulation and to annul existing laws and agreements.[141]

Furthermore, the Customs Service believes that Customs has not embarked on a new policy but continues to implement historic U.S. goals.[137] In a 1982 letter to Senator Moynihan, Alfred de Angelus, Acting Commissioner of Customs, explained that it has "always been the policy of the United States to assist foreign countries in recovering stolen property, particularly art objects," and that the Customs Service has worked with the State Department and other agencies to assist various foreign governments, among them India, Italy, Germany, and several Latin-American countries, to recover stolen art.[138]

3. The Deflection Argument

The criticisms of Customs policy are based on a fear, which U.S. dealers expressed throughout their long opposition to the CPIA, that if the United States were to impose controls without the similar action of other art-importing countries, the market would simply be deflected elsewhere.[142] This policy underlies the bill to repeal McClain and rests on a conception of U.S. interest in reserving its share of the art trade. Several considerations oppose this policy. First, there is no data to suggest that deflection is occurring on any scale.[143] At the same time, as the U.S. Senate, commentators, and museum experts alike have emphasized, data is scarce, fragmentary, and difficult to obtain.[144] One museum representative has observed that most of the art in question goes to private collections and that auction catalogues may reveal some sense of its direction.[145] In this connection it is especially noteworthy that the major organizations of the art trade in the United Kingdom, including Sotheby's and Christie's, are adopting a

Code of Practice by which they undertake not to deal in stolen or illicitly exported art.[146]

In regard to the U.S. import of pre-Columbian art, the small number of pre-Columbian objects which Customs has detained in the past year suggests that less is coming in.[147] There is reason to think the pre-Columbian statute has had some effect;[148] the pre-Columbian source countries may also be enforcing export controls.[149] The realities of Customs enforcement show that NSPA prosecution is not a direct factor in control, although it may influence what comes in.

But the important point is that the United States is the major market for this art, and the strong U.S. dollar encourages import. Where U.S. statutes, bilateral agreements, or foreign export controls inhibit the importation of stolen art into the United States, some of it probably is deflected. However, laws of supply and demand suggest that prices will fall and the demand elsewhere will not be infinitely elastic. Elimination of the major market will decrease the trade in stolen pre-Columbian art.[150]

In making the deflection argument, the dealers quarrel here more with the policy underlying all these statutes and agreements--a policy of controlling trade in illicit art--than with the means chosen to achieve that end in the McClain decision. However, even though U.S. dealers may incur economic losses, to facilitate illegal import through the repeal of McClain seems retrograde, inconsistent, and not in the larger interests of the United States.

IV. THE VALUE OF MCCLAIN: AMERICAN POLICY AND PRESERVATION

A. The Value of McClain

Although the NSPA under McClain is unlikely to result in penal enforcement, McClain provides a sound legal basis for other U.S. efforts to address the continuing problem of pillage. Where foreign ownership laws meet the McClain requirements, such a country may establish ownership for the purposes of civil recovery. In two 1981 cases involving the attempted import of Peruvian pre-Columbian artifacts, the McClain theory enabled Peru to demonstrate its legal ownership and recover the objects. In neither case was a criminal

charge under NSPA brough against the dealers involved.[151] Thus, McClain furthers the traditional U.S. purposes of helping owners recover their art without the actual use of the NSPA. The Peruvian cases show McClain's legal authority in confirming that countries may validly own their historic treasures.[152] Furthermore, the symbolic force of McClain is an important factor. The potentiality of criminal enforcement may indirectly deter the importation of stolen art.

B. THE CONSISTENCY OF AMERICAN POLICY

1. The NSPA and the CPIA

The NSPA and the CPIA derive from complementary U.S. policies. The NSPA seeks to discourage theft and to assist in the return of stolen property to owners. Where the owner is a country, the NSPA overlaps with the commitment of the CPIA to control the pillage of archaeological sites and the preservation of cultural patrimonies around the world. Both the NPSA and the CPIA require that the countries of origin have sought to protect their property through export controls before either Act may apply. Under McClain, the NSPA and the CPIA reach materials that are in similar jeopardy. The NSPA honors the valid ownership laws of other countries; the CPIA levies import controls to protect the archaeological and ethnological materials of these countries from destruction and dispersion. Both Acts, together with the Pre-Columbian Act and the bilateral agreements, validate and protect cultural patrimony.[153]

2. The Archaeological Resources Protection Act of 1979

The United States has recently passed a law that makes all archaeological objects removed from government or Indian land the property of the U.S. government. The purpose of the Archaeological Resources Protection Act is to protect archaeological sites and objects on government owned and Indian lands.[154] In reporting the bill, the House Committee on Interior and Insular Affairs cited "the dramatic rise in recent years of illegal excavations on public and

Indian lands for private gain," the substantial increase in value of illegally obtained artifacts, and "the importance of the integrity of the archaeological site and the context in which archaeological resources are found."[155] The statute prohibits the "excavation, removal, alteration, or defacement of archaeological resources" except by permit.[156] Even with a permit, the statute mandates that "all archaeological resources removed from public lands will remain the property of the United States and be preserved in a suitable location, such as a museum or university."[157] Thus, the object may not be exported from the United States. The statute subjects offenders to criminal and civil liability.[158] Furthermore, where the object enters interstate or foreign comerce, it becomes subject to the NSPA and to statutes that specifically protect Federal property.[159]

Our own legislation regarding national archaeological treasures is thus consistent both with our avowed goals under the UNESCO Convention and the CPIA to protect cultural patrimonies that are in jeopardy and with the NSPA mandate to prevent the interstate and foreign transportation of stolen property. The archaeological objects covered by this 1979 statute fit within the McClain definition of validly owned government property and receive NSPA protection.

There are indications that not only, as Congressman William Frenzel observed during hearings on the CPIA, is the United States becoming a lootee nation as well as a looter,[160] but pillage is growing within our borders at an ominous rate.[161] In a recent news report, the U.S. Bureau of Land Management estimates that 80 to 90 percent of the prized Anasazi Indian sites in the Four Corners region of the American Southwest have been ransacked, mostly in the last five years.[162] The United States may soon, like the nations whose export controls it is reluctant to observe, have to impose export controls of its own.[163] The ultimate inconsistency would be to protect our own heritage through measures such as export controls and the Archaeological Resources Protection Act and refuse enforcement to other countries of the counterpart laws by which they

seek to protect their patrimonies. The Moynihan bill to repeal McClain would lead to this paradox.

CONCLUSION

The CPIA represents the most recent U.S. attempt to control the pillage of archaeological sites and the trade in stolen art. Under the McClain decision the pre-existing NSPA applies makes explicit the NSPA's application to cultural property stolen from countries which have passed clear and unambiguous ownership laws and which attempt to protect their art through export controls. Senator Moynihan has challenged the validity of McClain's definitions through a bill to exclude cultural property from the reach of the NSPA. He argues that McClain is inconsistent, both with U.S. common law and with congressional intent in the CPIA.

Senator Moynihan believes that U.S. common law restricts "stolen" and "ownership" to the taking of property from owners who possess it. Analysis of common law definitions and of U.S. judicial practice both before and after the McClain holding shows that ownership need not include possession and that governments may own property. The McClain court's requirements for valid government ownership are solidly grounded in principles and precedents of U.S. law.

The CPIA and the NSPA are consistent U.S. statutory remedies for the pillage of art and archaeological treasures. The U.S. Senate has specifically declared its intent that the CPIA should not supersede the NSPA or other U.S. statutes or agreements. Both the NSPA and the CPIA define U.S. law and the conditions for its enforcement under American initiatives and criteria. NSPA accepts a foreign government's law only if it meets U.S. standards. Both the NSPA and the CPIA require that the foreign nation maintain export restrictions. Additionally, the CPIA provides for bilateral or unilateral U.S. action, ~~in a situation of emergency~~. U.S. Customs enforcement of the NSPA and other U.S. laws is also consistent with congressional policy in the CPIA.

The NSPA, the CPIA, the pre-Columbian statute, and the bilateral agreements with Mexico and Peru share the common goal of

reducing pillage and the illicit art trade. The 1979 U.S. Archaeological Resources Protection Act to protect sites and objects on government and Indian lands parallels the valid national ownership laws of foreign countries and expresses U.S. commitment to protect our cultural heritage. To repeal McClain would be inconsistent with U.S. policy in the Cultural Property Implementation Act and with our own efforts to protect national patrimony.

Footnotes

1. See generally, Bator, An Essay on the International Trade in Art, 34 Stanford L. Rev. 275 (1982); Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 Art J. 94, (1969); K. Meyer, The Plundered Past (1973); J. Field Archeology (1972-1985).

2. The legislative history documents a decade of controversy between art dealers and representatives of the U.S. government, the museum community, archaeologists and anthropologists. Legal scholars and advisors to the various constituencies also participated in the years of debate. Between the original bill (1973) and the final version of the CPIA passed Dec. 21, 1982, five successive bills, representing varying degrees of revision, entered Congress.

3. The CPIA was enacted Jan. 12, 1983. 19 Weekly Comp. Pres. Doc. 58 (Jan. 17, 1983). Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, see 301-315 (1982), codified at 19 U.S.C. 2601.

4. Nov. 14, 1970, 16 UNESCO C/Res. at 135; 823. U.N.T.S. 231 (1972), reprinted in 10 Int'l Legal Materials 289 (1971). Hereinafter UNESCO Convention." UNESCO stands for "United Nations Educational Scientific and Cultural Organization."

5. Cultural Property Implementation Act, supra, §§303, 304.

6. Cong. Rec. §2611-12 (daily ed. March 6, 1985); 128 Cong. Rec. §15987, H 10755 (daily ed. Dec. 21, 1983); McAlee, The McClain Case, Customs, and Congress, 15 N.Y.U. J. Int'l. L. & Pol. 813 (1983); Fitzpatrick, A Wayward Course: the Lawless Customs Policy Toward Cultural Properties, 15 N.Y.U. J. Int'l L. & Pol., 857 (1983). See also 18 U.S.C. §§2314 and 2315 (1976).

7. United States v. McClain, 545 F. 2d 988, reh'g denied, 551 F. 2d 52 (5th Cir. 1977); United States v. McClain, 593 F. 2d 658 (5th Cir.), cert. denied, 444 U.S. 918 (1979).

8. 18 U.S.C. §2314.

9. 545 F. 2d at 1000-01.

10. Cong. Rec. §2611-12 (Mar. 6, 1985).

11. Telephone interview with Stuart Seidel, Assistant Chief Counsel for Enforcement, U.S. Customs Service, Mar. 8, 1985.

12. P.L. 96-95, codified at 16 U.S.C. 470.

13. When Greedy Collectors Plunder the Past, U.S. News and World Report, March 4, 1945.

14. Testimony of Dr. Clemency Coggins, Chairperson, Subcommittee on the Preservation of Archaeological Resources, Archaeological Institute of America, Hearing before the Subcommittee on Trade, Committee on Ways and Means, House of Representatives, 96th Cong., 1st Sess. on H.R. 3403 (1979), at 30. Statement of Dr. Philip Speser, Washington Representative, Society for American Archaeology, Washington, D.C., January 25, 1985. Meyer, supra, at 13. See also Meyer, supra; etc.

15. Meyer, supra, at 12.

16. See Merryman, International Art Law: From Cultural Nationalism to a Common Cultural Heritage, 15 N.Y.U. J. Int'l Law & Pol. 757 (1983); Bator, supra, at 294-310.

17. Merryman, supra; Bator, supra.

18. Nowell, American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches, 6 Syr. J. Int'l L. & Com. 77 (1978) at 98-99 and 104-05; The Retention and Retrieval of Art and Antiquities Through International and National Means: The Tug of War Over Cultural Property, 5 Brooklyn J. Int'l L. 103, 122 (1979).

19. The National Stolen Property Act, 18 U.S.C. §§2314 and 2315 (1934); The Act to Prevent Importation of Pre-Columbian Sculpture and Murals, Act of October 27, 1972, Pub. L. No. 93-587, Tit. II, Stat. 1297 (codified at 19 U.S.C. §§2091-95 (Supp. II 1972); The Archaeological Resources Protection Act of 1979, P.L. 96-95 (codified at 16 U.S.C. 470); the Cultural Property Implementation Act, Pub. L. No. 97-446, §§301-315 (1982), codified at 19 U.S.C. 2601.

20. Treaty of Cooperation for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Property, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088; Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sept. 15, 1981, United States-Peru, T.I.A.S. No. 10, 136.

21. Agreement between the United States of America and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties (May 21, 1984); Agreement Between the United States of America and the Republic of Equador for the Recovery and Return of Stolen Archaeological Historical and Cultural Properties (not in force: needs to be signed by Equador Congress).

22. The United States became a signatory of the UNESCO Convention on Dec. 2, 1983.

23. 19 U.S.C. §§2091-95 (1972).

24. Id.

25. 545 F. 2d 988 (5th Cir. 1977); 593 F. 2d 658 (5th Cir. 1979).

26. 18 U.S.C. §2314 (1934).

27. The National Motor Vehicle Theft Act, 18 U.S.C.A. §2312 (1919) (NMVTA). For a history of the NMVTA, see United States v. Turley, 352 U.S. 407, 77 S.Ct. 397, 1 L. Ed. 2d 430 (1957). For analysis of the relation between the NMVTA and the NSPA, see United States v. Smith, 686 F. 2d (1982) at 244-45.

28. Id.

29. Id. at 245.

30. UNESCO Convention, supra, Art. 9, 7(b).

31. Id., Art. 9.

32. Id., Art. 7(b).

33. CPIA, 19 U.S.C. §2601, §§303 and 304.

34. Id., §303.

35. Id., §304.

36. Id., §306.

37. Id., §308.

38. See, for example, Hearings Before the Subcommittee on International Trade of the Committee on Finance, United States Senate, 97th Cong., 2d. Sess. July 22, 1982, hereinafter cited as 1982 Hearings, p. 473. Dr. Richard E. W. Adams, President of the Society for American Archaeology, described the compromise as between "people who are interested in the cultural aspects and the scientific aspects, which are two values that are attached to any artifact, and people who are interested, on the other hand, primarily in the commercial aspects and the esthetic aspects." See also, Rosecrance, Regulation in the Illicit Trade in Cultural Property: A Balancing Act, unpublished article (1985).

39. 19 U.S.C. §2601, §303(a)(1)(A)(B)(C).

40. Id. §303(d)(1)(2).

41. Comments of Andre Emmerich, Art Dealer, in Symposium, Legal Aspects of the International Traffic in Stolen Art, 4 Syracuse J. Int'l L. & Com. 51, 107, 111 (1976).

42. 19 U.S.C. §2601, §304(a)(1)(2)(3).

43. Id.

44. 19 U.S.C. §2601, §304(c)(3).

45. McClain I, 545 F. 2d. 988.

46. Id. See also, McClain II, 593 F. 2d 658 at 660-63.

47. 593 F. 2d at 671-72.

48. Id. at 665.

49. 545 F. 2d at 1003-04; 593 F. 2d at 671-72.

50. 593 F. 2d.

51. 545 F. 2d at 1000-01.

52. Id. at 995.

53. Id. at 992.

54. Id. at 1002-03.

55. 545 F. 2d at 1000-01; 593 F. 2d at 67-71.

56. 128 Cong. Rec. §15987 (daily ed. Dec. 21, 1982).

57. Cong. Rec. §2611-12 (Mar. 6, 1985).

58. Id. at §2612.

59. Id.; See also, McAlee, The McClain Case, Customs, and Congress, 15 N.Y.U. J. Int'l L. & Pol. 813 (1983); Fitzpatrick, A Wayward Course: The Lawless Customs Policies Toward Cultural Properties, 15 N.Y.U. J. Int'l L. & Pol., 857 (1983).

60. Cong. Rec. supra, at §2612.

61. Id.

62. Id.

63. See Senator Moynihan's remarks in 128 Cong. Rec. (Dec. 28, 1982) and his speech in Cong. Rec. §2612 (Mar. 6, 1985). See also, Bator, supra, at 350. McAlee quotes the Bator language. See McAlee, supra, at 827. The American Association of Dealers in Ancient, Oriental, and Primitive Art filed an amicus curiae brief in McClain I. They assert that "the decision below has the extraordinary effect of converting the importation into the United States of art works exported without authorization from another country--an act never before regarded as culpable under the law of the United States--into a criminal violation of a federal statue." 545 F. 2d at 991. Mr. McAlee was an author of this brief.

64. Cong. Rec. supra, at §2612. See also Senator Moynihan's remarks in 128 Cong. Rec. (Dec. 28, 1982); Fitzpatrick, supra, p. 870.

65. See Moynihan, supra, at §2612; McAlee, supra, at 837; Fitzpatrick, supra, 863-65. McAlee and Fitzpatrick attack the McClain decision but emphasize the inconsistency of the U.S. Customs Service's implementation of McClain with the CPIA.

66. See McAlee, supra; Fitzpatrick, supra. These commentators decry McClain and seek its repeal. The major portions of their articles attack the Customs Service in its enforcement of McClain and other U.S. initiatives to control the importation of pre-Columbian art.

67. Cong. Rec. supra, at §2612; McAlee, supra, at 837.

68. Cong. Rec. supra, at §2612.

69. Id. McAlee and Fitzpatrick express this view also. See McAlee, supra, at 827. See Fitzpatrick, whose amplified account of the "agreement" to overturn McClain, parallel s Senator Moynihan's. Fitzpatrick, supra, at 862-64.

70. See Senator Moynihan's statements in Cong. Rec. §2612 (Mar. 6, 1985) and in 125 Cong. Rec. §15987 (Dec. 28, 1982).

71. 545 F. 2d at 994-95.

72. Id. at 995.

73. Crabb v. Zerbst, 99 F. 2d 562, 565 (1939).

74. Lyda v. United States, 279 F. 2d 461 (5th Cir. 1960); Edwards v. Bromberg, 232 F. 2d 107, 110 (5th Cir. 1966).

75. 545 F. 2d at 995.

76. The anti-McClain commentators run a gamut in their characterizations of McClain from "bad law" to "puzzling" to "questionable" to "controversial." See McAlee, supra, at 827; Moynihan, supra, at §2612; Fitzpatrick, supra, at 862. See also Wolf, Emerging United States Policy With Regard to the International Movement of National Cultural Property, 7 Int'l Trade L.J. 166, 175 (1982). Wolf says that McClain makes law.

77. United States v. Smith, 686 F. 2d 234 (5th Cir. 1982) at 243; United States v. Long Cove Seafood, Inc., 582 F. 2d 159, 163 (2d. Cir. 1978).

78. United States v. Gallant, 570 F. Supp. 303, 313 (1983).

79. See 128 Cong. Rec. supra; Cong. Rec. S2612, supra. 545 F. 2d at 992.

[80]545 F .2d at 992.

[81]Smith, supra, at 243; Long Cove, supra, at 163.

[82]545 F .2d at 992.

[83]16 U.S.C., 470 (1979).

[84]Greer v. Connecticut, 161 U.S. 519, 529, 16 S. Ct. 600, 40 L. Ed. 793 (1896).

[85]Long Cove, 582 F .2d at 165-66. "We do not suggest that a larceny could not be proven here. If an owner gives permission to a clam digger to take mature clams and expressly prohibits the taking of seed clams, and if the digger exceeds this license and intentionally takes both mature and seed clams, then the digger may be guilty of a larceny of the seed clams. It would be no less a larceny if the owner were a town and the express prohibition were found in a town ordinance."

[86]See, for example, United States v. Plott, 345 F. Supp. 1229, 1232 (S.D.N.Y. 1972): Plott cited the Geer proposition, that a state owns wildlife in its sovereign capacity; United States v. Klapisch, 77 Cr. 620 (June 12, 1978): Judge Sifton of the Eastern District of New York sustained a government claim to the skins of wild alligators of which Louisiana had declared itself to be the owner. Cited in Long Cove, supra, at 163. For mineral rights cases, see (citations to be completed).

[87]593 F .2d at 671.

[88]Senator Moynihan, Cong. Rec. 125, S12419 (Sept. 28, 1982).

[89]Bator, supra, at 350-351.

[90]593 F .2d at 670-671.

[91]Id. at 671.

[92]Id. at 670.

[93]545 F .2d at 1000-01; 1002-03.

[94]~~Fitzgerald~~ Fitzpatrick, supra, at 867.

[95]545 F .2d at 1002-03.

[96]Bator, supra, at 351.

[97]Cong. Rec. S2612 (Mar. 6, 1985).

[98]545 F .2d at 996.

[99]Fitzgerald, supra, at 869.

[100]545 F .2d at 994. The Court cites three pre-McClain NSPA cases, United States v. Rabin, 316 F .2d 563 (7th Cir. 1963), cert. denied, 375 U.S. 315, 84 S. Ct. 48, 11 L. Ed. 2d 50; United States v. Greco, 298 F .2d 247 (2d Cir. 1962), cert. denied, 369 U.S. 820, 82 S. Ct. 831, 7 L. Ed. 2d 785; United States v. Hollinshead, 495 F .2d 1154 (9th Cir. 1974). Of these cases, only Hollinshead concerned art.

[101]545 F .2d at 994.

[102]Cong. Rec., supra, (Mar. 6, 1985)

[103]545 F .2d at 992.

[104]~~Fitzgerald~~ Fitzpatrick, supra, at 874. ~~Fitzgerald~~ Fitzpatrick says "McClain reflects the confusion that may develop over whether there is in fact a viable foreign law which vests ownership in a particular class of item." But McClain resolved this confusion by ruling that only the 1972 Mexican law of ownership provided a clear basis on which to claim ownership. The requirement that national laws of ownership be unambiguous is a safeguard against indiscriminate enforcement of the NSPA.

[105]545 F .2d at 995.

[106]See Moynihan, Fitzgerald, McAlee, supra.

[107]Id.

[108]Id.

[109]Cong. Rec. supra, (Mar. 6, 1985)

[110]See Moynihan, ~~Fitzgerald~~ Fitzpatrick, McAlee, supra.

[111]See Tables 1 and 2, Appendix, for a survey of overlap and distinctions among the U.S. statutes and agreements that control art.

[112]Cong. Rec. S2612 (Mar. 6, 1985).

[113]Id. at S2611-12.

[112]Cong. Rec. S2612 (Mar. 6, 1985).

[113]Id. at S2611-12.

[114]Senate Report No. 97-564, 97th Cong., 2d Sess., Sept. 21, 1982 at 22.

[115]S. EXEC. REPORT No. 29, 92d Cong., 2d Sess. 17 (1972) at 20.

[116]Senate Report No. 97-564, supra, at 33. It should be noted that Patricia Wald, Assistant Attorney General of the U.S. Department of Justice in 1977, when the CPIA was in process, opposed an amendment to repeal McClain. She stated that to overturn the criminal and civil laws of the fifty states would be an extraordinary act, not warranted by the circumstances, and contrary to the objectives of the UNESCO Convention. See letter from Patricia M. Wald, Ass't Attorney General, to Rep. Charles A. Vanik, Chairman, Subcom. on Trade, House Ways and Means (July 26, 1977) (copy on file at N.Y.U.J. Int'l L. & Pol.) cited in Truslow, supra, at 848.

[117]Telephone interview with Edward Ing, Mar. 4, 1985. Telephone interviews with Stephen Weglian, Department of Justice, March 4, 1985; Stuart Seidel, Assistant Chief Counsel for Enforcement, U.S. Customs Service, March 5, 1985; March 15, 1985; Ely Maurer, Assistant Counsel for Educational and Cultural Affairs, January 25, 1985; March 14, 1985; Dr. Philip Speser, Washington Representative, Society for American Archaeology, Washington, D.C., January 25, 1985; Ellen Herscher, Program Coordinator, International Council of Museums, Committee, American Association of Museums, March 15, 1985.

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Mr. Ing stressed that he acted only on behalf of his principal, Senator ~~Moynihan,~~ who wished to help end the long deadlock between dealers and the other constituencies and facilitate passage of the CPIA. Mr. Ing described a series of meetings with representatives of public and private interests. Only the principals, i.e., Senator Moynihan and Senator Matsunaga (with Senator Dole's cooperation) agreed that Senator Dole would introduce the bill to repeal McClain. This agreement involved no further commitment and did not bind the representatives of government and the academic and museum communities. Mr. Ing. received no commitment from officials in the State Department, the Department of Justice, or the U.S. Customs Service, to support the bill. The parties interviewed and other, off the record sources, confirm Mr. Ing's recollection of the events. It is noteworthy that Senator Matsunaga did not reintroduce the bill in 1985 with Senator Moynihan.

[118]19 U.S. C. 1641, Section 303.

[119]Off the record sources.

[120]Fitzgerald, supra, at 871-872, Senators Moynihan, supra, and McAlee, supra, also express this view.

[121]See Bator, supra, 371.

[122]545 F .2d.

[123]See Bator, supra, at 353; Fitzgerald, supra, at 875.

[124]See McAlee, supra, at 827.

[125]United States v. Hollinshead, 495 F .2d 1154 (9th Cir. 1974). In this case, the U.S. government prosecuted an art dealer who had imported a famous monumental Guatemalan stela , the Machaquila, which had been stolen, dismembered, and exported. Art experts were familiar with the work; it was registered as a Guatamalan historical monument; the dealer knew it was stolen. No one suggested that Guatemalan claims of ownership were invalid, or that the NSPA should not apply. In McClain, the objects involved were not renowned but their provenance was traceable; there was plenty of evidence that they had been stolen from Mexican pre-Columbian sites in violation of Mexican law, and, as the McClain court ascertained through a careful survey of Mexican law, the 1972 law gave valid ownership to Mexico. McClain was as clear an instance of theft from a legitimate national owner as was Hollinshead. A particularly interesting aspect of McClain is that the defendants were arranging further to sell artifacts accumulated in Los Angeles by Clive Hollinshead, the Hollinshead defendant, items valued at $850,000. See McClain II at 662-63. The McClain court, [illegible] merely articulated guidelines for valid government ownership.

[126]See Moynihan, McAlee, Fitzpatrick, supra.

[127]Cong. Rec. S2612 (Mar. 6, 1985).

[128]Fitzgerald, supra, at 865.

[129]18 U.S.C. 545, 19 U.S.C. 1497, or U.S.C. 1592, as appropriate.

[130]19 U.S.C. 1499.

[131]See note.

[132]Telephone interviews with Stuart Seidel, Mar. 6, 1985 and Mar. 15, 1985.

[133]Id.

[134]Id.

[135]Id. Mr. Seidel notes that in one of these cases, military dictatorship had suspended the Constitution. Therefore, although a previously valid ownership law existed, the U.S. Customs Service would not enforce it.

[136]Id.

[137]Mr. Seidel and the de Angelus letter emphasize this.

[138]Letter of July 10, 1982. Cited in 1982 Hearings.

[139]Seidel, supra, and de Angelus letter, supra.

[140]See Fitzpatrick, supra, at 866, note 32. See also, Reinhold, U.S. Seeks to Limit Questionable Art Imports, N.Y. Times, Sept. 1, 1981, at A 17, Col. 2. According to Mr. Seidel, what he said was that "we have to consider these (instances of importation) on a case-by-case basis because some objects are subject to prohibition, some not." The N.Y. Times reporter (Reinhold) responded, "Oh, you are winging it." The N.Y. Times printed a correction next day.

[141]Seidel, supra.

[142]Numerous dealer statements in the legislative history of the CPIA verify this. Senator Monihan similarly opposed the CPIA in Hearings. Extensive documentation will appear in the final version of this Note.

[143]Telephone interview, March 14, with Ann Guthrie, Executive Officer, USIA; Ellen Herscher, telephone interview, supra.

[144]See, for example, Senate Report 97-564, supra, at 23, Bator, supra, at 291; telephone interviews with Ann Guthrie, supra; telephone interview with Ellen Herscher, supra; telephone interview with Stuart Seidel, supra.

[145]Telephone interview with Ellen Herscher, supra.

[146]Code of Practice for the Control of International Trading in Works of Art, U.K., Final Draft. Signatories to this document, which include all the major members of the U.K. fine arts and antiques trade, undertake not to import, export, or transfer objects where they have reasonable cause to believe that a) the seller has not established good title (whether the object has been stolen or illicitly acquired); b) that an imported object has been acquired in or exported from its country of export in violation of that country's laws; c) that an imported object was acquired dishonestly or illegally from an official or illegal site.

[147]Speculations of Stuart Seidel and off the record sources.

[148]See Bator, supra, at 334-35, note 101.

[149]Interview with Stuart Seidel, supra.

[150]Interview with Ellen Herscher, supra.

[151]Truslow, Peru's Recovery of Cultural Patrimony, N.Y.U. J. Int'l L. & Pol., 839, 849-850 (1983).

[152]Id.

[153]See Tables 1 and 2, Appendix, for coverage of the U.S. statutes and agreements.

[154]16 U.S.C. 470.

[155]House Report No. 96-311, June 29, 1979, 1710-12.

[156]Id., at 1713.

[157]Id., at 1712.

[158]Id., at 1714.

[159]Id., at 1713-14.

[160]1979 Hearings, supra, at 11-12.

[161]Senate Report 97-564, supra, at 23, U.S. News and World Report, supra.

[162]U.S. News and World Report, supra; interview with Ellen Herscher, supra.

[163]S. EXEC. REP. NO. 29, supra, at 20. In its Advice and Consent to the UNESCO Treaty, the Senate reserved its right to impose export controls. It may be noted that Canada, also a signatory to the UNESCO Convention, has by its enabling legislation declared its recognition of the export laws of other countries, designated certain property part of Canada's cultural heritage, and subjected this property to export controls. See Clark, The Cultural Property Export and Import Act of Canada; Legislation to Encourage National Cooperation, 15 N.Y.U. J. Int'l L. & Pol., 765, 771 (1983).

APPENDIX

Table I

Requirements	NSPA	CP.
Govt. Declaration: Clear & unambiguous	Yes	No
Objects exported after date law	Yes	No: after date CPA (1983)
Export controls country of origin	Yes	Yes
Stolen--govt.	Yes	Yes: if govt.-owned museum, etc.
Stolen--museum	Yes	Yes
Stolen--private	Yes	No
Illicitly exported	No--unless stolen	Yes
Scienter	Yes	No
Burden on prosecution: beyond reasonable doubt	Yes	No
Burden on plaintiff: preponderance	No	Yes
Penal--fine or imprisonment	Yes	No
Civil--recovery and return	No	Yes

Table II

Remedies	Stolen Govt.	Stolen Museum	Stolen Private	Illicit Not Stolen	Export Restrictions	Civil	Crimi
CPA	yes, if museum	yes	no	yes (jeopardy: multilateral emergency: unilateral)	yes	yes	no
NSPA	yes, if scienter + clear & unambiguous law + stolen after law & export control	yes + scienter	yes + scienter	no, unless stolen	yes	no	yes
Archaeological Resources Protection Act	yes	yes, if shown to be from govt. or Indian lands	yes, Indians	illicit is stolen	yes	yes	yes
Pre-Columbian statute	no	no	no	yes	yes	yes	no
Civil	yes	yes	yes	no	yes	yes	no
Bilateral	yes	yes	yes	no	yes	yes	no

Mr. MAURER. At footnote 117 is where the statement is made about the nonexistence of such a compromise position.

Senator MATHIAS. In his statement, Senator Moynihan said, "Therefore, as part of the compromise that led to the passage of the CCPIA, the concerned parties agreed to support separate legislation to overturn the *McClain* decision's interpretation of the NSPA. I considered that agreement an essential element of the understanding that led to uncontested passage of the CCPIA."

Mr. MAURER. We are aware of that statement and we dispute it—you can get Mr. Ing on to testify and all the other people whom I have mentioned and I do not believe you will find that a single one——

Senator MATHIAS. Well, perhaps more important than the question of whose memory is more accurate is the question of whether or not the bill before us does reflect the Unesco Convention's principles.

Mr. MAURER. I think we are prepared to speak to that, and we have spoken to that. The principle which we believe is part of the Unesco system and which we have emphasized several times is that there was nothing meant to be done by the Unesco Convention which in any way superseded or interfered with existing common law remedies.

In that connection, I can start with the report of the delegation that negotiated the Unesco Convention. In that report—and Prof. Paul Bator was on the delegation and the report was cleared by him—it is said the Unesco Convention does not affect or supersede any existing common law remedies.

Then, again, we said that same thing in connection with the submittal of the Unesco Convention to the Senate for advice and consent as to ratification. We have quoted in our statement two places where that is mentioned.

We also made that statement in the long course—and I have been 10 years involved in following this legislation and working on it—in the long course of the legislative deliberations and several times in the reports of committees on this bill, the reports have constantly said there is no override of the common law remedies; and we have again repreated that point in our statement here.

Neither Professor Bator nor Senator Moynihan, frankly, referred to that legislative history. It is the basis for our saying that this was a situation where there were many different routes to follow, many different procedures. In a sense, the procedures overlapped. They each had their differing and distinguishing characteristics, and I will say that the article of Barbara Rosecrance points this out very well and even has a chart that shows it. And what we are saying here is that there was no general overriding emanation, if you will, from the enactment of the Cultural Property Implementation Act that everything was to be done by a concerted international effort.

For instance, you might say that if that was to be the case, we would expect tomorrow for Senator Moynihan to come in and say, well, look, that legislation you passed in 1972 dealing with unilateral control of pre-Colombian monumental art—that ought to be reversed because that is not a joint, concerted international effort; that is an individual effort.

But what we are saying here is that the concerted international effort must be considered as restricted to section 303, and that means that if a country request some assistance, then the request has to go to the Cultural Property Advisory Committee and then its advice has to go to the President and then an agreement has to be negotiated, and then there may come into effect some import controls, and those import controls will be very helpful for another country because immediately the country will get the Federal Government to help it in recovering that which comes in contrary to the import controls.

But this is no way derogates from the existence of another remedy which has different characteristics—the remedy of having a prosecution under the National Stolen Property Act. That remedy has its own difficulties. It has the difficulty that it requires scienter to show that the individual had knowledge when he bought it of the——

Senator MATHIAS. I have not heard that word for years. [Laughter.]

Mr. MAURER. Right; it is mentioned in some of our statements, but basically it is the kind of thing that comes up where the National Stolen Property Act is invoked; but also there is available the common law remedies in civil suits where you just prove that you have title and you bring the suit, as evidently happens in the United States and can happen under the interpleader procedures—so I think we have a complex of remedies.

What has been attempted here is to extrapolate from one remedy dealing with section 303 an emanation that controls all the other remedies, and that is not a correct interpretation.

Senator MATHIAS. Thank you.

Senator LAXALT. Thank you, Senator Mathias.

We thank the members of the panel. There may be additional questions.

Senator MATHIAS. I think, on reflection, there almost certainly will have to be additional questions. [Laughter.]

Senator LAXALT. Before Senator Moynihan left, he asked that the Chair clarify a point that we had discussed with respect to the situations where it would be appropriate to impose import restrictions under the Cultural Property Implementation Act.

Under that act, the President must find that U.S. action would be applied in concert with similar restrictions imposed by those nations individually having a significant import trade in cultural properties.

Not all importing nations must participate, but the presence of the nonparticipating nations must not be essential to deter the pillage. Senator Moynihan recalls Finance Committee discussions indicating that this might mean, for example, participation by seven of nine importing nations. That is what he was referring to in his testimony.

I would like to include in the record a statement by Senator Biden dealing with this subject of the hearing.

Our last panel is composed of two supporters and two opponents of S. 605. I understand that Mr. Solley and Professor Bothmer will be introduced by Douglas Ewing, president of the American Association of Dealers in Ancient, Oriental and Primitive Art. Mr.

Ewing will also submit a statement and will be available to answer questions.

Our final witnesses are Dr. Albert Dekin, of the Society for American Archeology, and Maureen Robinson, who is representing the American Association of Museums.

I extend our welcome to all of you. Mr. Ewing, you may proceed. In view of the time press, and I understand what we have got the defense bill on the floor, I would appreciate it greatly if the members of the panel would summarize their testimony because your full statements will appear in the record.

Will you kindly proceed?

STATEMENT OF A PANEL CONSISTING OF: DOUGLAS C. EWING, PRESIDENT, AMERICAN ASSOCIATION OF DEALERS IN ANCIENT, ORIENTAL AND PRIMITIVE ART; THOMAS T. SOLLEY, DIRECTOR, INDIANA UNIVERSITY ART MUSEUM; BERNARD V. BOTHMER, LILA ACHESON WALLACE PROFESSOR OF ANCIENT EGYPTIAN ART, INSTITUTE OF FINE ARTS, NEW YORK UNIVERSITY; ALBERT A. DEKIN, JR., CHAIR, GOVERNMENTAL AFFAIRS COMMITTEE, SOCIETY FOR AMERICAN ARCHEOLOGY; AND MAUREEN ROBINSON, LEGISLATIVE DIRECTOR, AMERICAN ASSOCIATION OF MUSEUMS

Mr. EWING. Mr. Chairman, before proceeding, I would like to give you one citation. You were talking about the case in Great Britian.

Senator LAXALT. Yes.

Mr. EWING. It was *Attorney General* v. *Ortiz* of 1983,[1] appealed in the House of Lords, in which it was found, by the way, that the nation claiming ownership of the property did not have a valid claim; that it was, in fact, privately owned.

My name is Douglas Ewing and I am president of the American Association of Dealers in Ancient, Oriental and Primitive Art. I would like to introduce two speakers—Dr. Bernard Bothmer, Lila Acheson Wallace professor of ancient Egyptian art of the Institute of Fine Arts of New York University, and Mr. Thomas Solley, director of the Indiana University Art Museum.

In addition to these speakers, we have a panel which will try to answer any questions that may have arisen. The members of this panel are Mr. André Emmerich, Mr. Peter Marks, Mr. Leon Pomerance, Mr. Alan Wardwell, myself, and Mr. James Fitzpatrick, our attorney from Arnold and Porter.

Thank you, Mr. Chairman.

[The prepared statement and responses to written questions of Senator Laxalt follow:]

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[1] *Attorney General* v. *Ortiz*, [1983] 2 All E.R.93 (House of Lords), affirming the decision of the Court of Appeal, [1982] 3 All E.R. 432.

STATEMENT OF DOUGLAS C. EWING
IN SUPPORT OF S. 605,
SUBMITTED TO THE SENATE COMMITTEE
ON THE JUDICIARY, SUBCOMMITTEE ON
CRIMINAL LAW -- MAY 22, 1985

My name is Douglas C. Ewing, and I live at 122 East 93rd Street, New York, New York. I am a private dealer in master paintings and American Indian art, and I am President of the American Association of Dealers in Ancient, Oriental and Primitive Art. I have appeared on behalf of this association in all of the public hearings which finally produced the Cultural Property Implementation Act ("CPIA"), Public Law No. 97-466, which became law on 12 January 1983. In addition, this association participated as amicus curiae in the case of United States v. McClain. 545 F.2d 988 (5th Cir. 1977).

The CPIA and the McClain decision may at first seem to be distinct issues, but the potentially very harmful effects of McClain on the CPIA will be made clear today in these hearings. To illustrate the relationships between the two, it may be useful to present a brief background of them.

McClain

In 1975, five defendants were convicted in a federal court in Texas of receiving stolen property in contravention of Section 4 of the National Stolen Property Act, as amended, 18 U.S.C. § 2315. The "stolen" property in this case was a group of artifacts from several pre-Columbian cultures in Mexico. This conviction was overturned on appeal. On retrial, the defendants were again convicted and that conviction was sustained on appeal.

The details of this case need not be reviewed here, but we must look at the law by which the convictions were achieved. But we will all be hard put to find

that law, even if we have access to an extensive law library, because it is not printed in our standard sources. It is the law of Mexico.

The governing law is Ley Federal Sobre Monumentos y Zonas Arqueologicos, Artisticos y Historicos, 312 Diario Oficial 16, 6 de mayo de 1972, articles 27 and 28. In translation the law states:

"Archaeological monuments, movables and immovables, are the inalienable and imprescriptible property of the Nation."

"Archaeological monuments" are defined as:

"Movable and immovable objects, product of the cultures prior to establishment of the Spanish culture in the National Territory, as well as human remains, flora and fauna, related to these cultures."

That is clear enough. The Mexican government claims to own all objects of whatever source or significance, associated with the many and varied cultures which were indigenous to the present country of Mexico before the Spanish set about so methodically to destroy those cultures. What is not so clear to me is why such a patently absurd and domestically unenforceable law is to be honored in this country -- as it is nowhere else among art-importing countries. So far as I am able to determine, it is without precedent in American jurisprudence.

Most of us grew up with a good idea of what "stolen" meant. To us it meant removed from rightful possession by stealth or force. The quality of legitimate possession of the object in question was altered by an act. But in United States v. McClain, that quality was altered by a declaration of a foreign government. In its prosecution of the McClain defendants, the

U.S. government never asserted that the Mexican government or any of its citizens had actually possessed the objects in question. No, the objects were "stolen" because the Mexican government declared them to be so, and American citizens were prosecuted and convicted of offering "stolen" property for sale. What is to prevent other governments from making similar declarations, resulting in more federal prosecutions? What is to prevent further McClain-type prosecutions of literally thousands of museums and collectors in this country, possessors who in good faith acquired objects from pre-Columbian Mexican cultures, who esteem and preserve them, who allow them to be exhibited and published for the benefit of all those interested, with a public-spiritedness that exists nowhere else on earth? Their only protection, Sira, is in Congress' hands; S. 605 must be passed.

Cultural Property Law

The discussions and debates over the enabling legislation for the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property extended for more than a decade in this country. The association which I represented, then and now, was in basic sympathy with the intent of the legislation, but had very strong reservations about two of its components. Our first reservation was removed when the legislation was altered to require as a condition to a U.S. embargo multinational response to a demonstrably specific instance of jeopardy to a particular type of cultural property, before the United States would impose an embargo on importation.

Our second reservation was with the section on stolen cultural property, and we requested that a definition of "stolen" be added to the legislation to overturn McClain and to make absolutely clear that the

CPIA was the definitive statement of U.S. policy on the importation of cultural properties. We were informed that the Senate Committee on Finance, which had jurisdiction over the bill, could not alter the terms of the criminal code, and that a separate bill would have to be considered by the Judiciary Committee. With the assurance that such a bill would be introduced by Senators Dole, Matsunaga and Moynihan, and that it generally would be supported, or at least not opposed, we withdrew our opposition and the cultural property law was enacted. The "stolen" property bill was not intended to prolong the debate in which so many of us had been involved for so many years. It was intended to be a matter of routine, to clean up some unfinished business in a bill passed now more than two years ago. But instead, the debate continues.

The Cultural Property Implementation Act established a reasonable process by which certain and specific "archaeological crises," if you will, could be dealt with in concert with other art-importing nations and unilaterally in an emergency. The law required multinational responses as the general rule because we were aware that unilateral responses were quixotic. Yet in spite of this law, the State Department has continued to negotiate and execute agreements that require only unilateral action. Why is this inconsistency an issue here? Because these agreements are based only on McClain-type assertions of ownership, not on any of the standards set forth in the cultural property law.

The Department of the Treasury, specifically, the United States Customs Service, has gone its own way as well. Its Manual Supplement 3280-01 of 5 October 1982 (after the CPIA was formulated, but before it became law) reiterated the McClain decision and stated, in part:

> c. If items of a type subject to Peruvian or Mexican ownership claims are imported into the United States but are properly declared as to value and description for Customs purposes, the objects should be detained pending a determination of lawful ownership. The Office of Investigations shall be notified and the cultural attache of the respective country asked to verify authenticity of the object and determine whether the country has a claim of ownership as to the specific item. If an importer will not recognize the country's claim of ownership it may be necessary to institute legal proceedings in the nature of an interpleader action to establish ownership. Therefore, the Regional Counsel shall be notified whenever such an action is contemplated.
>
> d. If during the investigation it is determined that the items are not of Peruvian or Mexican origin but are from another South or Central American country claiming ownership, the foreign country's cultural attache shall be advised of the importation. If the foreign country wishes to assert a claim to the article, interpleader should be considered unless a National Stolen Property Act or Customs violation was involved, in which case "a" or "b" above should be followed.

In other words, the importer of a pre-Columbrian object was presumed to be guilty of theft. With this threat, would you import any pre-Columbian object, of whatever provenance? Would you lend your object abroad, knowing its return was in jeopardy? Indeed, would you even make it available to scholars, knowing that its publication might lead to a prosecution under the National Stolen Property Act?

When we were working on the Cultural Property Implementation Act we became aware that we were not simply dealing with a prospective law, but were involved in formulating a national policy. That is why so many years were devoted to that bill and why so many views were heard. Not only did Congress establish a set of rules by which specific crises could be dealt with effectively but, and more importantly, Congress wished to establish a climate beneficial to the study, exhibition, publication, collection and preservation

of the cultural heritage of all mankind. The essential ingredient in this climate is the knowledge of what is, and what is not, stolen. As long as the McClain decision remains law, this climate will remain polluted, for we are all aware that what is legal one day may become illegal the next.

I offer this testimony not only on behalf of this association, but for many hundreds of other art historians, collectors, museum curators and trustees, and dealers. Some of these have joined me by signing a request that you pass S. 605, and their names are appended to this statement.

RESPONSES OF MR. DOUGLAS C. EWING
TO QUESTIONS SUBMITTED

UNDER THE LAW OF MEXICO, CAN A MEXICAN CITIZEN LEGALLY OWN (AS OPPOSED TO MERELY POSSESS) A PRE-COLUMBIAN ARTIFACT?

-- Although I am not an authority on Mexican law, it is my understanding that items privately owned prior to 1972 continued, after the passage of vesting legislation, to be privately owned.

The actual significance of such explicit grandfather clauses is limited, however, if in Mexico -- or in any other country with vesting legislation -- those who possess artifacts "owned" by the government are allowed to bequeath them, give them to others as gifts or sell them. In such a situation, the distinction you attempt to draw in your question -- "own (as opposed to merely possess)" -- is largely illusory. The state's declaration of ownership, if it only becomes relevant when an artifact is being exported, is really nothing more than an export control disguised as something else. By crediting such selectively enforced vesting statutes, the United States is, in fact, allowing another country's export laws to determine our import policies, a practice that even the McClain court recognized as improper. See 545 F.2d at 996.

IS THERE ANY PROCEDURE BY WHICH AN ART DEALER MAY PURCHASE (OR OBTAIN PERMISSION TO EXPORT) A PRE-COLUMBIAN ARTIFACT FROM THE MEXICAN GOVERNMENT?

-- Again, I must confess that I am not an authority on Mexican law. My understanding from my colleagues and from members of the Association is that the government of Mexico will not sell pre-Columbian artifacts to art dealers or others, nor will it issue a license for the export of such artifacts. While that policy may change in the future, I believe that it has been rigorously observed until now.

IN MR. EWING'S TESTIMONY, THE DECLARATION OF OWNERSHIP ENACTED BY THE MEXICAN GOVERNMENT IS DESCRIBED AS BEING "WITHOUT PRECEDENT IN AMERICAN JURISPRUDENCE." OPPONENTS OF S. 605, HOWEVER, CONTEND THAT McCLAIN "FOLLOWS FROM LONGSTANDING COMMON LAW PRINCIPLES AND . . . PARALLELS RELIEF EXPRESSLY PROVIDED IN THE CASE OF ARCHEOLOGICAL RESOURCES DECLARED TO BE THE PROPERTY OF THE UNITED STATES BY THE ARCHEOLOGICAL RESOURCES PROTECTION ACT." (MAURER TEST. AT 6) PLEASE COMMENT ON THE APPARENT INCONSISTENCY BETWEEN THE TWO POSITIONS.

-- The witnesses who find precedent for McClain in "longstanding common law principles" and who believe the court of appeals' decision in that case "parallels relief expressly provided in the case of archeological resources declared to be the property of the United States" are misconstruing both common law and statute. Simply put, we are aware of no precedent in American law that vests ownership on the basis of a governmental declaration unaccompanied by a possessory interest in either the object at issue or the site on which the object is found.

Certainly, the common law principles that would be applied to determine ownership of artifacts left

by prior civilizations are inconsistent with the holding of McClain. As explained by one court, "[u]nder the common law . . . a finder who takes possession of lost or abandoned property and exercises dominion and control over it acquires title [i.e., ownership]." Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 568 F. Supp. 1562, 1565 (S.D. Fla. 1983). There are two exceptions to this general rule, but under both of them the owner of the land on which property was found -- not the government as sovereign -- becomes the owner of the property.* Id. at 1565. Thus, under the common law, neither the general rule nor its exceptions would vest ownership in the state of all property of a certain nature, wherever found.

Nor is the comparison to the Archeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa

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* There is, in some jurisdictions, an "exception to the exceptions" for treasure trove -- "money or coin, gold, silver, plate or bullion found hidden in the earth or other private place, the owner thereof being unknown," Black's Law Dictionary (revised 4th ed.) at 1673 (emphasis omitted). Early on, "laws were in effect which gave all this treasure to the sovereign," but, as the common law evolved, "it was later held to belong to the finder . . . regardless of whether he was in ownership or possession of the land where the treasure was found." Schley v. Couch, 284 S.W.2d 333, 335 (Tex. 1955).

Thus, even the common law rule regarding treasure trove has been, at least for the last several centuries, inconsistent with the type of sweeping declaration of state ownership recognized in McClain.

et seq., helpful to defenders of McClain. ARPA, like the common law, is entirely inconsistent with the concept of ownership applied in McClain. For instance, while ARPA regulates "archeological resources and sites which are on public lands and Indian lands," 16 U.S.C. § 470aa(b), it is only those materials taken from lands "owned and administered by the United States," 16 U.S.C. § 470bb(3), which are declared to "remain the property of the United States." 16 U.S.C. § 470cc.[5] In other words, Congress, in enacting ARPA, has made a careful distinction, one squarely at odds with McClain's holding that ownership of cultural property depends on the existence of a sweeping declaration rather than on the ownership of the land from which the property is taken.

Accordingly, by enacting S. 605, Congress would merely be evincing an intent that a foreign country's claim of state ownership of cultural property should only be honored when it is consistent with the common law and the statutory principles that govern similar claims asserted by the United States government or by

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[5] In Klein, supra, the court held that the United States had constructive possession of a shipwreck because it was the owner of the premises on which property was located, and because through ARPA it had expressed the "intention . . . to exercise dominion and control over the vessel" in question. Klein, supra, 568 F. Supp. at 1567-68.

any of the states.[6]

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[6] Other authorities also support the principle that governmental ownership in the United States flows, not from broad declarations, but rather from a possessory interest in either specific objects or the premises on which the objects are found. For instance, in United States v. Long Cove Seafood, Inc., 582 F.2d 159 (2d Cir. 1978), the Second Circuit found that a prosecution under the NSPA would be appropriate if there were evidence that shellfish were taken without consent from bay bottoms held by certain towns. Id. at 165-66. There was no such evidence and the court of appeals went on to hold that an NSPA violation could not be based on New York State environmental statute declaring that "[any person who kills, takes or possesses such shellfish . . . thereby assents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition." Id. at 164-65, quoting N.Y. Env. Cons. Law § 11-0105. See also Wild Free-Running Horses and Burros Act, 16 U.S.C. § 1332 et seq. (placing "under the jurisdiction of the Secretary [of the Interior]" all "unbranded and unclaimed horses" on public lands).

SEVERAL SENATORS ON THE SUBCOMMITTEE HAVE EXPRESSED A QUITE VALID CONCERN THAT PASSAGE OF S. 605 WOULD FRUSTRATE LEGITIMATE LAW ENFORCEMENT OBJECTIVES. IF McCLAIN IS OVERRIDDEN, WOULD THE ACTIVITIES OF ENFORCEMENT OFFICIALS TO DETER UNSCRUPULOUS IMPORTERS BE DETERRED?

-- Passage of S. 605 would in no way frustrate any legitimate law enforcement objectives. First, the National Stolen Property Act would still be fully effective to prosecute persons who have stolen cultural property in any traditional sense. S. 605 would simply reestablish the timehonored distinction between theft under U.S. law and an illegal export under a foreign law. As Professor Bator (recent Assistant Solicitor General) said in his essay, The International Trade in Art, the McClain case "erodes the distinction, and does so in a way that is disturbing." Id. at 74. With the proposed amendment to the National Stolen Property Act, criminal liability will no longer be imposed simply on the basis of a foreign export restriction coupled with a foreign assertion of ownership. S. 605 will thus reaffirm that "U.S. customs laws do not explicitly, and never have been interpreted to, bar the importation of art objects solely because they were exported in violation of another country's laws," id. at 11, n.30.

Accordingly, S. 605 would in no way exempt the activities of art importers from criminal prosecutions for theft (as we knew it until McClain) or for illegal importation. For instance, the National Stolen Property Act would still be available as a vehicle for punishing any importer who knowingly transports stolen goods. The difference is that those goods will only be considered stolen in the traditional sense, i.e., a person has acted to disturb someone else's superior possessory interest in an object. Thus, anyone taking an object from someone's house, or from a museum, or anyone taking an object that a foreign country has placed on display, that it has registered as its property or that has been removed from a site that is under its control, would still be criminally liable for theft in the United States.

Moreover, if the provisions of the Cultural Property Implementation Act, P.L. 97-446, were brought into play as the comprehensive policy of the United States regarding the importation of cultural property -- which its sponsors clearly thought should be the case -- import restrictions could be placed on specific goods or specific categories of goods whenever the President, with the assistance of the expert Cultural Property Advisory Committee, determines that such restrictions

are warranted. As the CPIA's legislative history makes clear, these restrictions would be based upon our "independent judgment regarding the need and scope of import controls" and would not "be bound by the characterizations of other countries." S. Rep. No. 564, 97th Cong., 2d Sess. at 27 (1982). Violation of the restrictions would give rise to criminal liability, see 18 U.S.C. § 545 (criminal penalties for importation "contrary to law"), even if the goods were not stolen.

Similarly, it appears that liability could arise under 18 U.S.C. § 545 in the case of an importer who attempted to bring into the United States a pre-Columbian monumental or architectural sculpture or mural which could not be documented as having left its country of origin prior to 1972. The basis for prosecution in such a case would be the 1972 statute on the Regulation of Importation of Monumental or Architectural Sculptures or Murals, 19 U.S.C. §§ 2091 et seq. That statute creates an exception to the general rule; in response to a particular crisis of grave proportions, Congress made a determination that for a specific category of cultural property, U.S. import policy should be based on another

country's export restrictions.[7]

Thus, S. 605 would provide no comfort to importers of goods taken from the possession of a foreign government. It would provide no comfort to importers of goods that the President -- after making the necessary findings with the assistance of the Cultural Property Advisory Committee -- has determined to be subject to import restrictions. And it would provide no comfort to importers of goods that Congress has specifically determined to be worthy of exceptional treatment. In these situations, appropriate criminal prosecution could still be initiated. At the same time, however, importers of cultural property that is not stolen under relevant principles of American jurisprudence, nor subject to import restrictions based upon the standards set forth in the Cultural Property Implementation Act, nor within the scope of the law passed by Congress to address a specific emergency, would be free from the threat of criminal prosecution and would not be subject to the Customs Service's prohibitively restrictive enforcement policies. In short, the benefits of S. 605 would flow,

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[7] In terms of its narrow scope, reflecting an independent determination made in this country in response to a genuine emergency, the 1972 statute bears greater similarity to the procedure contemplated by the CPIA than to the undiscriminating and standardless rule that emerges from the Fifth Circuit's decision in McClain.

not to thieves and plunderers, but to legitimate art dealers, collectors, and museums and to the general public, all of whom would enjoy greater access to cultural property.

ANOTHER THEME SOUNDED BY OPPONENTS OF S. 605 IS THAT, AS PARAPHRASED BY SENATOR LAXALT, "THE McCLAIN DECISION DOES NOT THREATEN LEGITIMATE IMPORTERS AND SELLERS OF OBJECTS OF ART." YOUR ORGANIZATION, OBVIOUSLY, BELIEVES THAT THIS IS NOT THE CASE. EXPLAIN WHY YOU BELIEVE THAT McCLAIN DOES POSE A THREAT TO LEGITIMATE DEALERS AND COLLECTORS.

-- The McClain decision and, more directly, the use of that decision as the linchpin of certain administrative policies, does indeed threaten legitimate importers and sellers of art. According to Customs Service's guidelines based on McClain, an artifact subject to a foreign country's declaration of ownership is subject to forfeiture, even if it had been in a private collection in that country for many years and even if the importer paid full value for the property and knew nothing of the country's declaration of ownership.* Moreover, even artifacts not subject to such a declaration of ownership will still be seized by Customs unless the

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* While a criminal conviction under the NSPA requires scienter -- in McClain established by knowledge of the Mexican government's declaration, see 545 F.2d at 1001-02, n.30 -- no evidence of a knowing violation of a foreign declaration is required for the institution of a civil forfeiture action by the Customs Service. See Supplement to Policies and Procedures Manual Re: Seizure and Detention of Pre-Columbian Artifacts at 3 (Oct. 5, 1982).

importer can prove to the satisfaction of Customs officials that, in fact, no foreign country claims ownership of them based upon McClain.

The problems are exacerbated by Customs', State's and Justice's inability or unwillingness to set forth in a clear and consistent manner which countries have made declarations of ownership sufficient to satisfy McClain and when the earliest effective vesting statute of a particular country was enacted. Amidst all this confusion, the wholly understandable reaction on the part of those who are unwilling to risk criminal prosecution or financial losses has been to stop importing into this country any artifacts that could conceivably be subject to a foreign government's claim under McClain.

Accordingly, one cannot measure the effects of McClain by looking at how many prosecutions have been brought under the NSPA. Rather, the ensuing embargo in the importation of practically all pre-Columbian artifacts must be considered. When the full dimensions of McClain and the administrative action it has engendered are taken into account, it is easy to see the devastating effect that the case has had on legitimate importers and dealers, as well as on private collectors and museums. This is why passage of S. 605 is so essential.

Senator LAXALT. Very well. May we have the first speaker?

STATEMENT OF THOMAS T. SOLLEY

Mr. SOLLEY. Mr. Chairman, as director of a growing midwestern university art museum located in that great nowhere so memorably pictured by Steinberg on the New Yorker, and which is, nonetheless, somewhere to a lot of people, S. 605 is of vital concern.

Some of the people who oppose this legislation, I fear, share the limited perspective of that New Yorker cover. They think that the existence of a few major collections of ancient art concentrated in one or two parts of the country are all that we need.

For them, the question of those collections' accessibility to people who happen to live elsewhere is simply not an issue. My perspective, which I would like to share with you this morning, is quite different.

Throughout the last quarter century, major cultural institutions have developed in almost every populous region of this great Nation, some building on earlier foundations, and some, like Indiana University Art Museum, springing from the dreams of a few enlightened and generous individuals.

Without the generosity of these donors, we would not exist today, nor expect to grow tomorrow. Three years ago, we opened the doors of a new building and for the first time the extensive resources of the museum have been accessible to the public.

In a community of approximately 80,000 residents and students, we have some 80,000 visitors a year. If you know anything about attendance, those are impressive figures.

Donors and visitors—what do these have to do with S. 605? Everything, in my opinion. Donors are a major factor in museum collection development and our visitors are certainly an important reason for our preservation and study of man's artistic production through the ages.

The *McClain* decision, which would be overturned by S. 605, has established standards of liability which are foreign to our law that a foreign government can simply decree that it owns every bit of cultural property within its borders.

If every importer, purchaser or art institution were subject in our courts to criminal sanctions because of sweeping declarations by foreign governments that they own property which, absent such declarations, could legally enter this country and be owned and cared for in good faith under U.S. law, we will continue to be confronted with growing injustice.

Even more importantly for our art institutions, we will face the beginning of the process of dismemberment and the end of future growth in all but contemporary art. We see this happening now with the virtual embargo on imports of pre-Colombian art that the *McClain* decision has prompted.

If we do not correct this situation, legitimate, respectable dealers will leave the business and collectors will stop collecting, to the future loss of our cultural institutions, or they will go underground, as do many collectors elsewhere in the world.

And I should point out that underground collections generally do not end up in public museums. They are enjoyed by a wealthy elite and are either passed on to their heirs or sold quietly at profit.

The very trade in cultural property which some seek to end by restrictive laws does not end; it simply finds other channels, ones which do not end up for the public's benefit in public institutions.

The solution is not to permit our criminal laws to be abused by sweeping declarations of foreign governments or for the U.S. Customs Service to become the self-appointed policeman for the governments of the world.

The solution is for the art-rich nations to protect their cultural patrimony through strict laws and enforcement. The plea of poverty lacks credibility when one considers how effectively the Chinese have preserved their heritage even through periods of extreme political upheaval.

The solution is also for the art-rich nations to engage in an enlightened exchange program of their surplus cultural resources with the institutions of industrialized consumer nations of the world.

Basements full of rotting objects do no one any good. I thought that this Congress had set up a process to make decisions about imports rationally and carefully when it passed the Cultural Property Act in 1983. The *McClain* decision should not be permitted to thwart that policy.

The threat that the *McClain* decision poses to private collectors is equally shared by the public cultural institutions of this country. The problems are multifaceted. Most cultural institutions in this country are hard-pressed to meet the increasing public demand for access and programs without the burden of import restrictions based on foreign ownership laws inconsistent with our own and without the threat of expensive litigation.

The cost of labor to protect a museum's collections both when open to the public and closed, as well as the cost for educational programs, increases every year. Most museums are barely keeping up with inflation, often doing so only because they are receiving governmental or special corporate assistance.

We cannot lose sight of the fact that one of the principal reasons museums exist is to serve the public. It is the citizens of this Nation who will bear the most serious burdens of the *McClain* decision—a decision which threatens both the cultural institutions and the processes by which they grow and prosper.

The fact that the public wants museums and cultural institutions is proven not only by the enormous expansion of such institutions since the Second War, but by the national attendance figures for art events.

Even in Bloomington, where basketball is king, more people attend art events each year than all the enthusiastically supported sports events. Thanks to the enlightened atmosphere which has encouraged collectors to give, taxpayers to support and the Government to provide direct assistance, more people in more communities nationwide have access to original works of art in museums than ever before in this country or anywhere in the world.

Let us continue this process rather than threaten it with an unrealistic and arbitrary judicial decision. Thus, I urge you to enact S. 605.

Thank you, Mr. Chairman.

Senator LAXALT. Thank you very kindly, Mr. Solley.

[Responses to written questions of Senator Laxalt follow:]

SUPPLEMENTAL RESPONSES OF MR. THOMAS SOLLEY
TO QUESTIONS SUBMITTED

IS IT YOUR OPINION THAT EXISTING LAW AND THE McCLAIN DECISION HAVE RAISED THE PRICES OF CULTURAL PROPERTIES TO THE EXTENT THAT SMALLER MUSEUMS WILL BE UNABLE TO AFFORD MANY IMPORTED ART OBJECTS?

-- Certainly, the effect of the McClain decision and the administrative actions purportedly based on it has been to restrict the opportunities for smaller or newer museums to acquire cultural artifacts. Moreover, the problem has been enhanced by Customs' use of McClain to create a virtual embargo on pre-Columbian goods. In other words, the consequences of McClain go far beyond the decision in that case: U.S. museums have lost access, first, to many articles that come from countries which do not actually vest ownership of such property in the state, and, second, to articles that were initially exported from their countries of origin before such broad declarations of ownership were made. In short, the uncertainty resulting from McClain -- perhaps more than the case itself -- has provided a powerful disincentive for legitimate art dealers, collectors and museums; understandably, no one is willing to risk criminal prosecution or financial losses.

I believe that the demand for those artifacts that can be purchased without risk, such as those indisputably in the United States prior to the enactment of vesting statutes by countries of origin, may escalate dramatically. Smaller museums or museums seeking to build collections may, in effect, be priced out of this shrinking market.

DO YOU HAVE ANY INDICATION THAT CURRENT LEGAL REQUIREMENTS HAVE RESULTED IN INCREASED UNDERGROUND ART COLLECTING IN RECENT YEARS?

-- By their very nature, "underground" collections

defy tracking. Such collections are widespread throughout Europe, where, whether for reasons relating to income-tax avoidance, other legal considerations, or simply because the ethos of art collecting is different, private collectors do not make known the extent of their collections and do not make pieces available for publication, study or display. McClain and its aftermath might similarly encourage collections of this kind in the United States, since public knowledge of a collector's new acquisitions can result in forfeiture of the artifacts and may expose him or her to criminal prosecution.

WHY SHOULD A U.S. MUSEUM'S DESIRE TO ARTIFACTS BE GIVEN PRECEDENCE OVER A NATION'S DESIRE TO KEEP ITS ARTIFACTS WITHIN ITS BORDERS?

-- In 1983, Congress made a determination that our national policy regarding the importation of artifacts should reflect a careful balancing of relevant interests on a case-by-case basis. Thus, under the Cultural Property Implementation Act, whether a U.S. museum's desire for artifacts should be given precedence over another nation's desire to keep within its borders artifacts found there is simply not an issue that can be resolved in the abstract. Rather, such factors as the nature of the artifact, the museum's plans with regard to that artifact, and what will happen to the artifact if left within the country of origin must be considered. In all cases, the determination made should be the one which best advances the relevant values associated with the collection, preservation and study of artifacts.

As Professor Bator and others have noted, consideration of these factors frequently leads to the conclusion that export of artifacts to the United States and elsewhere is preferable to simply crediting the desires of the country in which the artifact was found:

> [T]he national patrimony should not be defined so as to suggest that it is desirable that a nation retain all of its art, or even all of its important art. More specifically, nations should freely allow and encourage the export of art treasures that cannot or will not be adequately protected and conserved at home. In addition, there should be a large international trade -- at fair prices -- in those nonmonumental art treasures whose export does not jeopardize the legitimate national patrimony -- that is, whose export will leave standing a rich and representative collection at home.

Bator, The International Trade in Art, at 33 (1982) (emphasis in original).

Under the Cultural Property Implementation Act, a cross-section of experts would consider these and other factors and our national policy regarding the importation of cultural property would reflect a proper balancing of the various interests. Unfortunately, the McClain decision has frustrated the effective operation of the CPIA, making passage of S. 605 vital.

WOULD PASSAGE OF S. 605 AFFECT THE WILLINGNESS OF FOREIGN GOVERNMENTS TO PARTICIPATE IN EXCHANGE PROGRAMS?

-- Conceivably, passage of S. 605 could affect the willingness of certain governments to participate in exchange programs. For several reasons, however, I do not view this as a valid basis for opposition to S. 605.

First, because passage of S. 605 will result in the entry into this country of pieces and collections now being excluded, it may actually result in an increase in the amount of cultural property lent to or acquired

by various institutions.[1] Second, since there is no evidence that the McClain decision motivated any countries to increase their participation in exchange programs, there is no reason to believe that its override will, in such programs, especially if participating countries receive in return things they value from the United States. Third, such an unreasonable reaction, were it to occur, would most likely be of limited duration. Finally, if, as Congress determined when it passed the Cultural Property Implementation Act, our policies regarding the importation of cultural property are to be the product of independent determinations by the U.S. government, then the prospect of such reactions by foreign governments should not be allowed to interfere with the exercise of the independence that ought to characterize U.S. actions in this area.

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[1] Indeed, one example of the chilling effect that McClain has had was alluded to by Senator Moynihan during the hearings: 30 major items of a collection of pre-Columbian art, all of which had been taken out of Mexico prior to 1929 (i.e., before the passage of the declaration, that according to the McClain court, vested ownership of such artifacts in the Mexican government) were supposed to be exhibited in New York last May; despite the fact that no declaration of Mexican ownership applied to the collection, the sponsors of the exhibit were forced to cancel it when they could not receive assurances from the Customs Service that the pieces would not be seized at the port of entry under the purported authority of McClain.

AREN'T EXPORT CONTROLS AN EFFORT ON THE PART OF ART-RICH NATIONS TO PROTECT THEIR CULTURAL PATRIMONY THROUGH STRICT LAWS?

-- Certainly, exports controls often represent an effort on the part of art-rich nations to protect their cultural patrimony through strict laws. This alone, however, does not mean that such controls should be a legitimate basis for determining whether artifacts can or cannot be imported into the United States. Indeed, Congress clearly rejected the notion that the export controls imposed by other countries should be the decisive factor in this nation's determination whether to admit cultural properties.

First, allowing another country's export controls to have such weight would contravene a "fundamental general rule" that, at least before McClain, was observed in the United States just as it currently "obtains in all other major art importing countries, including England, France, Germany and Switzerland[:]"

> The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.

Bator, supra, at 11 (emphasis in original) (footnotes omitted).[8]

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[8] During the May 22 hearings, the State Department's witness cited a case decided in Great Britain in support of the proposition that an article illegally exported from one country could not be lawfully imported into another country. This witness was incorrect; while a lower court did so hold, a higher court and the House of Lords both found that no English law barred the importation into Britain of a Maori artifact that had been removed from New Zealand in violation of that country's export controls. See Attorney General v. Ortiz, 1984, A.C. 1 (1983), rev'g, [1982] Q.B. 349 (1982).

Second, it is not at all clear that export bans or other restrictions do, in fact, contribute to the preservation of artifacts that are part of a country's cultural patrimony. Rather, such measures often contribute to the destruction of cultural property. This is especially true where the country does little else to promote preservation of artifacts. Moreover, while "there is probably no relationship in principle between the trade in nonmonumental art and its preservation, ... [o]ne general proposition may perhaps be advanced [:] The prospects for careful conservation and preservation at home decrease insofar as the type of art involved is available in large quantities, so that less and less importance is ascribed to any individual item[.]" Bator, supra, at 21-22 (emphasis in original). See also "Peru's Rich Antiquities Crumbling in Museums," The New York Times, Aug. 15, 1983, at C14.

Third, while every country has the right to define its cultural patrimony as it sees fit, and then to enact and enforce strict laws that it believes will ensure the preservation of that patrimony, there is no reason why the United States should be bound by another country's determinations in this area. Which artifacts are essential to that cultural patrimony, whether export controls will help preserve that patrimony, and how such controls will affect the other goals associated with art are all judgment calls. Even if lawmakers of another country have considered these issues carefully -- an assumption that is often unwarranted -- there is no reason why the United States should accept without question the results of foreign deliberations as a basis for our import policies.

Accordingly, among the central features of the Cultural Property Implementation Act are strict standards "to ensure that the United States will reach an

independent judgment regarding the need and scope of import controls." S. Rep. No. 564, 97th Cong., 2d Sess. at 27 (1982) (emphasis supplied). The explicit intent of Congress was that export controls enacted by other countries would not determine whether the United States restricted imports of cultural property:

> U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific values made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries.

Id. Thus, blind acceptance of other countries' export controls as bases for import restrictions here is contrary to fundamental precedent, to sound policy and to Congress' clearly articulated intent.[9]

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[9] When Congress has permitted U.S. import policy to be based on another country's export restrictions, it has done so after making an independent determination that, in response to a particular crisis of grave proportions, restrictions on the importation of a specific category of cultural property were warranted. See Act on the Regulation of Importation of Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091 et seq. This "exception" to the general rule actually bears greater similarity to the procedure contemplated by the CPIA than to the undiscriminating and standardless rule that would emerge if export control laws of other countries were allowed to determine import policies of the United States.

1. In my opinion there is no implication in S. 605 that U.S. museum's or cultural institutions desires for artifacts are given precedence over a nation's desire to keep its artifacts within its border. The U.S. implementation of the Cultural Property Act recognizes the right of nations to protect their cultural patrimony. It further establishes means by which this country can respond to emergency situations of cultural loss.

2. I see no reason why the passage of S. 605 should in any way effect the willingness of foreign governments to participate in foreign exchange programs. S. 605 in fact underscores the Cultural Property Implementation. Foreign governments have beed led by the State Department to believe that McClain gives them a special advantage in dealing with import problems. McClain is bad law as many have pointed out (Professor Paul Bator, etc.) and subverts the entire process of the Cultural Property Implementation. After the passage of S. 605, if the State Department feels they need additional legal muscle, intelligent legislation that does not thwart the processes of the Cultural Property Implementation should be developed. Above all the forum for such a process should be removed from Criminal court to the Civil courts of this country where it belongs.

3. Export controls are an effort on the part of art-rich nations to protect their cultural patrimony. Those nations who have tough export controls and a support system to monitor them (eg. Great Britain, Greece) have very effectively controlled the out-flow of cultural property.

T.S. In my opinion McClain has had no significant bearing on the increase of prices for objects emanating from nations whose protective laws would benefit from McClain. The Customs Service embargo on such imports has virtually ended the import of such objects. The inflation in antiquities from Mexico which were already in the U.S. prior to 1972, has not been significantly different from other inflationary trends in the art market. If anything, it would appear that the embargo has diminished the demand for such objects. On the other hand, there is no question that the serious limiting of the availability of legally acceptable antiquities will have an inflationary effect in the future. Smaller museums will undoubtedly suffer.

2. Underground art collecting is extremely difficult to monitor. Since it is a human trait to desire that which is restricted or difficult to acquire, I would conclude that the underground collecting of contriband art continues undeminished.

Senator LAXALT. Professor Bothmer.

STATEMENT OF BERNARD V. BOTHMER

Mr. BOTHMER. Mr. Chairman, my name is Bernard Bothmer. I am professor of ancient Egyptian art at the Institute of Fine Arts in the graduate school of New York University. Until my retirement in 1982, I was chairman of the Department of Egyptian and Classical Art at the Brooklyn Museum.

For well over 50 years—as a matter of fact, since 1932 when I had my first job in a museum in Europe—I have studied art objects and antiquities. And in view of my lifelong interest in the preservation of antiquities, and on the basis of this experience, I take the liberty of addressing this committee today.

The relics of the past—major works of art as well as minor artifacts—are part of man's history and we citizens of the free world brought up in the tradition of Western humanism have a moral duty to the past as well as to the future to preserve this precious heritage.

It is a major task to conserve the ruins of antiquity that have been above ground and exposed to the ravages of time for hundreds of years. It is an almost impossible job to save the antiquities that come out of the ground daily in countries with rich pasts.

The countries with which I am most familiar, those bordering on the Mediterranean, have for some time had laws that declare all antiquities—those found and those yet to be found—to be property of the state. Under these laws, collecting and trading and even temporarily possessing an antiquity is a felony punishable by imprisonment.

As a result, nothing of the stray finds that appear on the ground all over the place is picked up and preserved anymore. And objects of which the respective governments have had no knowledge are declared to have been stolen only when they turn up in Western Europe or in the United States.

Yet, it is this country and our allies in Europe who are the true preservers of the cultural heritage of almost all countries of the ancient world, and instead of discouraging the importation of relics of the past, I would encourage and applaud it, especially when such objects are acquired by public or semipublic institutions where they can be exhibited and enjoyed by all, kept track of and, when appropriate, could be returned for exhibition or study to the country of origin.

Last month, I attended a conference on legal aspects of the international art trade which took place from April 11 to 13 and was conducted under the auspices of the faculty of law at the University of Geneva, Switzerland.

There were about 300 registered participants of whom 200 were members of the legal profession—lawyers, judges, professors, students, legal experts—and almost 100 specialists in various fields of art—auctioneers, dealers, collectors, teachers, students, museum curators, and experts.

Among the over 50 panelists who read papers were only 3 Americans, and there were another 3 or 4 in the audience, myself included. As a former museum curator, I greatly benefited from the con-

ference and I came away with the impression that Western Europe is far advanced in comparison with us with regard to the regularization of the trade in works of art.

First of all, many countries very concerned with the preservation of man's cultural heritage have not implemented the Unesco Convention of 1970—Sweden, Norway, Belgium, Denmark, West Germany, France, Switzerland, and the United Kingdom—primarily because most of them believe that without a truly concerted multinational approach, it will not help to better preserve cultural artifacts.

Second, all countries represented at the conference, from Greece to Norway to Spain, all across the Western world, were in agreement that art is to all people of the free world a common responsibility and it should be permitted to move freely from country to country without legal restrictions and customs impediments.

As the days progressed, free trade in works of art became increasingly the main subject of this discussion, excepting only a few classes of objects of undisputed national interest.

Third, the case *United States* v. *McClain* was mentioned several times on the floor of the conference as, to the Europeans, it seemed to constitute an inappropriate legal standard. The consensus seemed to be that this was an aberration not to be emulated by the countries of the European Community.

In view of my long experience and of what I am learning day after day, I wish to support passage of S. 605. In closing, Mr. Chairman, I have added to my paper a few paragraphs delivered at Geneva by Prof. John Merryman of Stanford University, and I just would point out that the very last paragraph states there:

> There is something perverse about national laws purporting to "protect" the cultural heritage that instead leads to its destruction. The anomaly is magnified when international organizations are enlisted to support such laws. It should be clear that excessively retentive national laws are contrary to the international interest in cultural preservation, integrity and distribution. An expanded, licit international trade in art is more likely to advance the general interest in the "cultural heritage of all mankind."

Thank you, Mr. Chairman, for the opportunity to present my views on this subject. I will be glad to answer any questions the committee may have.

[The prepared statement and responses to written questions follow:]

TESTIMONY OF BERNARD BOTHMER
IN SUPPORT OF S.605,
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CRIMINAL LAW -- MAY 22, 1985

My name is Bernard Bothmer; I am the Lila Acheson Wallace Professor of Ancient Egyptian Art at the Institute of Fine Arts in the Graduate School of New York University. Until my retirement in 1982 I was Chairman of the Department of Egyptian and Classicial Art at The Brooklyn Museum. For well over 50 years -- since 1932, when I had my first job in a museum in Europe -- I have studied art objects and antiquities. On the basis of this experience I take the liberty of addressing this Committee today.

The relics of the past, major works of art as well as minor artifacts, are part of man's history, and we citizens of the Free World, brought up in the tradition of Western humanism, have a moral duty to the past as well as to the future to preserve this precious heritage. It is a major task to conserve the ruins of antiquity that have been above ground and exposed to the ravages of time for hundreds of years; it is an almost impossible job to save the antiquities that come out of the ground daily in countries with a rich past.

The countries with which I am most familiar -- those bordering on the Mediterranean -- have for some time had laws that declare all antiquities, those found and those yet to be found, to be property of the state. Under these laws, collecting and trading and even temporarily possessing an antiquity is a felony, punishable by imprisonment.

As a result, nothing of the stray finds that appear on the ground all over the place is picked up and preserved, and objects, of which the respective

governments have had no knowledge, are declared to have been stolen only when they turn up in Western Europe or the United States. Yet it is this country and our allies in Europe who are the true preservers of the cultural heritage of almost the entire ancient world; and instead of discouraging the importation of relics of the past, I would encourage and applaud it, especially when such objects are acquired by public or semi-public institutions where they can be exhibited and enjoyed by all, kept track of and, when appropriate, could be returned for exhibit or study to the country of origin.

Last month I attended a conference on legal aspects of the international art trade which took place from April 11 to 13 and was conducted under the auspices of the Faculty of Law of the University of Geneva, Switzerland. There were about 300 registered participants, of whom 200 were members of the legal profession: lawyers, judges, professors, students, and legal experts, and almost one hundred specialists in various fields of art: auctioneers, dealers, collectors, teachers, students, museum curators, and experts. Among the over 50 panelists who read papers were only three Americans, and there were another three or four in the audience, myself included.

As a former museum curator I greatly benefited from the conference, and I came away with the impression that Western Europe is far advanced in comparison with us with regard to the regularization of the trade in works of art.

First of all, many countries very concerned with the preservation of man's cultural heritage have not implemented the UNESCO Convention of 1970: Sweden, Switzerland, West Germany, France, Belgium, the United Kingdom -- primarily because many believe that without

a truly concerted multinational approach, it will not help to better preserve cultural artifacts.

Second, all countries represented at the conference, from Greece to Spain to Norway, were in agreement that art is to all people of the free world a common responsibility and it should be permitted to move freely from country to country without legal restrictions and customs impediments. As the days progressed, free trade in works of art became increasingly the main subject of discussion, excepting only a few classes of objects of undisputed national interest.

Third, the case United States v. McClain was mentioned several times on the floor of the conference as, to the Europeans, it seemed to constitute an inappropriate legal standard. The consensus seemed to be that this was an aberration not to be emulated by the countries of the European community. In view of my long experience and of what I am learning day after day, I wish to support wholeheartedly passage of S. 605.

In closing, Mr. Chairman, please permit me to quote from the paper delivered at the Geneva conference by Professor John H. Merryman of Stanford University:

> "The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 speaks, in its preamble, of 'the cultural heritage of all mankind.' On occasions like this one it is useful to remember that international trade in art is trade in pieces of the culture, in articles that have a special importance, extending beyond the parties to the particular transaction, because of their cultural significance. There is a general international interest -- one is tempted to say an overriding interest -- in the preservation, integrity and appropriate distribution and access of works of art.
>
> "A licit international trade in art, by allowing works to go where they are most valued and most likely to be cared for, can advance the international interest. National restrictions on the

> free movement of art, on the contrary, threaten the international interest in two significant ways. First, the demand for works whose export is prohibited will continue to exist. The traffic will go on; it will now, however, be illegal, with all of the unpleasant and sordid consequences, including destruction of cultural property and loss of cultural information, that such underground enterprise produces. Anyone who is familiar with the international art market knows that the principal effect of overprotective national laws is not to abolish the traffic in cultural property but to put it in the hands of the wrong people, who will do it the wrong way.
>
> "The second problem is that laws prohibiting the export of cultural objects, if effective, may insure their destruction. It is generally known that a number of nations that rigorously prohibit export have hundreds of thousands of unexplored, unexcavated and unprotected sites and large stocks of objects that they do not adequately preserve, do not exhibit, and do not make available for study. They lack the wealth and the cultural organization to deal adequately with such sites and artifacts. Many of the objects they hoard merely duplicate works fully represented in their museums, but they would be welcome additions to museum and private collections in other parts of the world, where they would be preserved, exhibited, and studied. Instead, abandoned in warehouses or seedy museum storerooms, without adequate care, a large part of the cultural heritage is lost each year through this kind of covetous neglect. Such national policies are a greater threat to the cultural heritage than all the huaqueros and tombaroli, and their equivalent in other cultures, combined.
>
> "There is something perverse about national laws purporting to 'protect' the cultural heritage that instead lead to its destruction. The anomaly is magnified when international organizations are enlisted to support such laws. It should be clear that excessively retentive national laws are contrary to the international interest in cultural preservation, integrity and distribution/access. An expanded, licit, international trade in art is more likely to advance the general interest in the 'cultural heritage of all mankind.'"

Thank you, Mr. Chairman, for the opportunity to present my views on this subject. I look forward to answering any questions that you or members of the subcommittee may have.

QUESTIONS FOR MR. BOTHMER, PROFESSOR OF ANCIENT EGYPTIAN ART AT NEW YORK UNIVERSITY

Question 1. Do countries with broad declarations of ownership ever permit an item to be exported? Do these countries ever sell an artifact, particularly one not unique, to a private collector or to a museum?

Answer. Yes. Some do, most do not.

Question 2. Are there any efforts that can be undertaken to encourage art-rich nations to allow more export artifacts?

Answer. Yes, by offering them payment for long-term loans to art-poor countries where the objects will be well taken care of, can be inspected, are on public view, and are clearly labeled as a loan of the people of X to the people of the United States

Question 3. Should the legitimate interest in preservation supercede a sovereign state's declaration of ownership of artifacts within its borders?

Answer. Yes, because the nations of the free world have a moral obligation with reference to the cultural heritage of ALL countries, especially of those where restrictive legislation makes it impossible for the individual to care for the relics from the times of his ancestors.

Question 4. You note that many countries have not ratified the UNESCO Convention because "without a truly concerted multinational approach, it will not help to preserve cultural artifacts." Yet several have testified that UNESCO is a multilateral approach. Can you explain a better multilateral approach?

Answer. Place the moral obligation at the doorstep of the HVE nations and, if they do not follow international standards for caring for their own heritage boycotting them culturally. We open our doors to refugees from oppression and do not enforce the oppressive laws of the countries from which the refugees come to our shores. The same holds true for antiquities; let them come to where they are best cared for and appreciated.

Question 5. In your statement, you quote Professor John Merryman to the effect that the traffic will continue in artifacts, whether or not export is permitted. Is there anything a nation can do to keep its own cultural property within its borders?

Answer. Yes, by encouraging its citizens to collect their own cultural heritage, to consider it as something venerable and sacred and teaching them that the art of the past belongs to all people, not just to the state, to the anonymous bureaucracy that has no understanding of cultural heritage.

Question 6. Is it your opinion that the strict laws governing the importation of cultural properties in the United States actually lead to the destruction of these properties? If so, what effective deterrent to illegal trafficking and art exploitation would you recommend?

Answer. The answer is NO to the way in which the question has been phrased. Indirectly any restrictive import laws lead to destruction in those countries where it is illegal to pick up an object of the past just uncovered in a building excavation for instance. Since picking up, holding, or worse possessing a relic of the past is illegal, the bulldozer keeps on destroying what is in the ground and what comes out of the ground, and none of the bystanders dares to interfere or even to pick up an endangered item. If we welcomed endangered art the way we welcome endangered people (the Boat People for instance), we would save more and possibly even induce the countries of origin to take better care of their heritage and let their own people partake in their preservation.

"Illegal" by whose laws? We must not recognize a foreign law that directly adds to the rapid destruction of that—or any other country's—heritage.

Question 7. Do you favor relaxing all international legal restrictions regarding the trading of works of art? Are any other nations in the world easing their legal restrictions on the trading of cultural properties?

Answer. Yes. All countries of the European Economic Community are striving for a free trade in works of art; see my comments on the conference held at the University of Geneva, April 11-13, 1985, during my testimony before the Committee.

RESPONSES OF THE AMERICAN ASSOCIATION OF DEALERS
IN ANCIENT, ORIENTAL AND PRIMITIVE ART
TO QUESTIONS SUBMITTED TO PROFESSOR BERNARD BOTHMER

IS IT YOUR OPINION THAT THE STRICT LAWS GOVERNING THE IMPORTATION OF CULTURAL PROPERTIES IN THE UNITED STATES ACTUALLY LEAD TO THE DESTRUCTION OF THESE PROPERTIES? IF SO, WHAT EFFECTIVE DETERRRENT TO ILLEGAL TRAFFICKING AND ART EXPLOITATION WOULD YOU RECOMMEND?

-- Insofar as laws governing the importation of cultural properties into this country reduce the flow of antiquities coming out of other countries, more artifacts will be destroyed. In fact, Professor Bator terms this the "one general proposition" that be advanced concerning the relationship between trade and preservation: "The prospects for careful conservation and preservation at home decrease insofar as the type of art involved is available in large quantities, so that less and less importance is ascribed to any individual item." Bator, The International Trade in Art, at 22 (1982).

Professor Bator's essay cites but one example of the general proposition in operation:

> "The problem concerns what many archaeologists call 'duplicates'. Since all ancient things were hand made, rarely are two exactly alike, but they are like enough so that the word 'duplicate' applies. Almost nobody has any idea what enormous, fantastic mountains of such 'duplicates' exist in the state-owned museums around the Meditteranean. Italian archaeologists laugh hollowly when newspapers report the theft of some 'unique, priceless' Etruscan vase. They know, but the public does not, how many thousands of these 'unique, priceless' vases they already have in storage and quite literally don't know what to do with."

Id. at 22, quoting Gaskill, "They Smuggle History," Illustrated London News, June 14, 1969, at 26. Moreover, the same situation obtains with regard to pre-Columbian artifacts found in Latin American countries. See "Peru's

Rich Antiquities Crumbling in Museums," New York Times, Aug. 15, 1983, at C 14.

As for "trafficking" in art -- legal or otherwise -- and "art exploitation" by those who trade in these objects, deterrence is neither required nor even desirable in most cases. Rather, we wholeheartedly endorse Professor Bator's view that "nations should freely allow and encourage the export of art treasures that cannot or will not be adequately protected and conserved at home" and that, with regard to nonmonumental art, "there should be a large international trade -- at fair prices -- in those . . . treasures whose export does not jeopardize the legitimate national patrimony -- that is, whose export will leave standing a rich and representative collection at home." Bator, supra, at 33 (emphasis in original).

DO YOU FAVOR RELAXING ALL INTERNATIONAL LEGAL RESTRICTIONS REGARDING THE TRADING OF WORKS OF ART? ARE ANY OTHER NATIONS IN THE WORLD EASING THEIR LEGAL RESTRICTIONS ON THE TRADING OF CULTURAL PROPERTIES?

-- Certainly, we do not favor relaxing all legal restrictions on the international trade in art; some such restrictions are necessary to preserve monuments intact, to facilitate study and to ensure that no country is deprived of its cultural patrimony. On the other hand, we do feel quite strongly that far too few cultural properties are being freely traded on the international market because of the overly restrictive, selfish and ultimately shortsighted policies of certain art-rich countries. Because McClain and the current McClain-based position of the State Department and the Customs Service is to defer blindly to some of those policies -- without regard to how unwise or how unfair they may be -- we believe that passage of S. 605 is necessary

to ensure that this country imposes restrictions only when truly necessary and reasonably likely to be effective.

If most other art-importing countries are not easing whatever restrictions they impose on the trading of cultural property, it is because they impose few, if any, such restrictions to begin with. Rather, these other art-importing countries are committed to the concept of free trade in art. When combined with safeguards of the sort incorporated into the Cultural Property Implementation Act, the adoption by the United States of a policy designed to encourage a free and legal art trade would best serve the legitimate interests of both importing and exporting countries.

DO COUNTRIES WITH BROAD DECLARATIONS OF OWNERSHIP EVER PERMIT AN ITEM TO BE EXPORTED? DO THESE COUNTRIES EVER SELL AN ARTIFACT, PARTICULARLY ONE NOT UNIQUE, TO A PRIVATE COLLECTOR OR TO A MUSEUM?

-- We do not know that countries with broad declarations of ownership never permit an item to be exported or that such countries never sell artifacts to private collectors or museums. It is our understanding, however, that those countries with which we are most concerned rarely, if ever, permit the exportation of artifacts or sell even their non-unique cultural property to foreign museums and collectors.

ARE THERE ANY EFFORTS THAT CAN BE UNDERTAKEN TO ENCOURAGE ART-RICH NATIONS TO ALLOW MORE EXPORT OF ARTIFACTS?

-- One of the principal ways to encourage art-rich nations to allow increased export of antiquities is for this country to make clear that broad declarations

of state ownership by foreign governments will no longer dictate our import policies. The United States should renounce reliance on the overly restrictive policies adopted by these nations and instead make clear that we will impose import restrictions only when they are needed and only when they have the potential to be effective. Then, these other nations would be forced to adopt more realistic policies that would take into account the need to protect artifacts, preserve patrimonies, and increase our understanding of man's history.

Passage of S. 605 would send just such a message to art-rich nations.

SHOULD THE LEGITIMATE INTEREST IN PRESERVATION SUPERSEDE A SOVEREIGN STATE'S DECLARATION OF OWNERSHIP OF ARTIFACTS WITHIN ITS BORDERS?

-- We know that quite often a primary effect of a foreign nation's declaration of ownership of antiquities is to deprive posterity of such artifacts; rather than being properly cared for, they are left to decay, thrown into warehouses and neglected, or, as mentioned by Professor Merryman in his speech at Geneva (which was quoted in Professor Bothmer's testimony), they are traded by profiteers who have no particular interest in preventing the "destruction of cultural property and loss of cultural information." When recognition by the United States of a declaration of national ownership is so clearly inimical to "the legitimate interest in preservation," that interest, shared by all mankind, should take precedence over narrow political considerations.

YOU NOTE THAT MANY COUNTRIES HAVE NOT RATIFIED THE UNESCO CONVENTION BECAUSE "WITHOUT A TRULY CONCERNED MULTINATIONAL APPROACH, IT WILL NOT HELP TO PRESERVE CULTURAL ARTIFACTS." YET SEVERAL HAVE TESTIFIED THAT UNESCO IS A MULTILATERAL APPROACH. CAN YOU EXPLAIN A BETTER MULTILATERAL APPROACH?

-- The UNESCO Convention envisions a coordinated, multinational approach to the treatment of cultural property. But unless all or almost all of the major art-importing countries ratify it and act in accordance with it, there will be no "truly concerted multinational approach." This, in part, explains the reluctance of many countries to become parties to the Convention without assurances that other art-importing countries will join them. Rather than engage in ineffective acts of self-denial such as those based on our current McClain-inspired policy, the United States should be attempting to convince other art-importing countries that multilateral efforts in those limited circumstances in which action is warranted provide a viable and effective means for addressing serious problems of pillage.

IN YOUR STATEMENT, YOU QUOTE PROFESSOR JOHN MERRYMAN TO THE EFFECT THAT THE TRAFFIC WILL CONTINUE IN ARTIFACTS, WHETHER OR NOT EXPORT IS PERMITTED. IS THERE ANYTHING A NATION CAN DO TO KEEP ITS OWN CULTURAL PROPERTY WITHIN ITS BORDERS?

-- The starting point for any art-rich nation interested in keeping cultural property within its borders should be a realistic assessment of which artifacts it is important to hold onto and which can be made available for export with no real loss to the country. In short, the draconian measures imposed by art-rich nations are not only ineffective as a means by which legitimate cultural patrimony can be protected; they are actually detrimental to those ends. Professor

Merryman, as Professor Bothmer's testimony indicated, made this point in Geneva. Professor Bator, too, discusses in his essay the need for art-rich nations to abandon undiscriminating embargoes in favor of less drastic and more carefully considered steps:

> [E]ven in countries where the looting of sites and monuments is a virulent problem, over-inclusive export embargoes on large categories of antiquities and archaeological materials are self-defeating and undesirable. Financial, political, and psychological resources should be focused on material that is truly important and whose protection is reasonably feasible. Export licenses should be denied only if an object can be clearly and specifically established to be stolen or the product of very recent looting, or if the object is of outstanding importance, or -- as in the case of the Maya stelae -- where pillage is threatening to destroy an entire category of highly significant archaeological remains. The state should reduce the incentive to loot by helping to satisfy the market through the sale and free export of already excavated material that cannot and will not be adequately conserved and exhibited at home. And, to the greatest extent possible, tax and other financial incentives should be created to persuade those in the possession of important antiquities and archaeological objects to retain them at home.

Bator, supra, at 50-51.

The United States does both itself and art-rich nations a disservice when it, in essence, endorses "self-defeating" and "undesirable" solutions such as the broad declarations of national ownership at issue in McClain. Reliance on the procedures set forth in the Cultural Property Implementation Act, which encourages art-rich nations seeking our assistance to devise effective means of helping themselves, would better serve the legitimate interests of art-rich nations, of the United States, and of posterity.

Senator LAXALT. Thank you very much, Professor Bothmer.
Our next witness will be Dr. Dekin. Will you proceed?

STATEMENT OF DR. ALBERT A. DEKIN, JR.

Dr. DEKIN. Thank you very much. As representative of the Society for American Archeology, we appreciate very much the opportunity to address the committee. We hope that the prepared testimony we have submitted will be included in the record and I will attempt to honor your request to be brief.

[The prepared statement and responses to written questions of Senator Laxalt follow:]

SOCIETY FOR AMERICAN ARCHAEOLOGY

2000 P St., NW, Suite 305, Washington, DC 20036 (202) 833-2322

Testimony Dr. Albert A. Dekin, Jr.,

Chair, Governmental Affiars Committee, Society for American Archaeology

before the

Subcommittee on Criminal Law

Mr. Chairman and Members of the Committee, the Society for American Archaeology is grateful for the opportunity to testify before you in opposition to S. 605. This bill is designed to overrule the McClain decision. The decision is an important one. It states that the National Stolen Property Act applies to antiquities where a nation has declared ownership over its antiquities and has taken steps, such as seeking to prevent illegal export, to exercise its ownership. As the nation's leading association of professional and advocational archaeologists, our opposition to this legislation should come as no surprise.

What S. 605 would do

The underlying problem which makes the McClain decision a vital tool for law enforcement agencies in the U.S. and foreign countries is the looting of antiquities to feed illegal markets. Of course, we wish that the illegal trade in antiquities would cease. Unfortunately, it continues and thus McClain is still important today. A recent U.S. News and World Report article entitled "When Greedy Collectors Plunder the Past," highlights the underlying problem.

> "The [looted] artifacts feed a multimillion dollar art market that subsidizes looting despite an array of federal, state and international laws prohibiting such commercial exploitation. Booty from sunken ships, ceramics from Mayan and Aztec tombs and museum-quality sculpture from Africa can produce huge payoffs for bounty hunters. Articles from Indian burial sites regularly bring hundreds of dollars apiece. A Mayan vase may sell for $15,000, while a well-preserved monolith from Mexico's Yucatan area may command as much as $125,000.
>
> "A recent case illustrates a frequent pattern: Artifact hunters dropped at night by helicopter into a Mayan temple in the Guatemalan jungle and chain-sawed ancient religious carvings off at their bases. A month later, the stone monuments were displayed for sale in a New York gallery with five-figure price tags."

The problem of looting exists in all countries. We can all think of simple solutions to the problem. For example, we could look to the use of security guards at banks for an analogy. To enable the same level of protection for archaeological sites that is common at banks, Congress could establish a foreign aid program which would enable countries to place armed guards on every archaeological site and provide them with authority to shoot thieves. Of course, this is an expensive option. Even in the United States we cannot afford to do it. Our poorer neighbors in the Third World are still trying to attain goals such as feeding their people, building an economic infrastructure, defending themselves from Communist aggression, and halting drug traffic. They cannot afford to do it either.

Does the fact that no-one can afford to definitively halt looting at the source mean protecting the world's cultural patrimony is unimportant? Of course not. It merely means that we must all work together to use existing resources as wisely as possible. One vital resource is the legal systems of the world. Archaeological items, like other material items, are property. The laws should protect this property just as they protect other property from theft. The laws should not protect thieves and those who trade or buy stolen goods from the action of the laws.

The underlying reality of what this bill seeks to do is clear from the language of the amendment proposed for the ends of sections 2314 and 2315 of the Title 18 of the United States Code:

> "This section shall not apply to any goods, wares, or merchandise which consists of archaeological or ethnological materials taken from a foreign country where —
>
> "(1) the claim of ownership is based only upon —
>
> "(A) a declaration by the foreign country of national ownership of the material; or
>
> "(B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership;
>
> "(2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and
>
> "(3) the defendent's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendent's knowledge of the illegal export and the defendent's knowledge of the claim of ownership described in clauses (1)(A) and (B)." [Emphasis added]

I urge you to reflect carefully on the language of this bill before examining the arguments you will hear today. What does the language say. Some people want to knowingly hold goods which are stolen and which they know are illegally exported. They want the laws of the United States to protect them when they knowingly participate in the illegal market.

I am an archaeologist, not a lawyer. I grew up with the understanding that our laws were supposed to discourage us from supporting criminal activities. No-one in high school civics ever taught me that it was permissible to support looting in another country by protecting those who brought ill gotten gain to market or purchased stolen goods. No-one is teaching my children that it is permissible to support stealing by protecting the American beneficiaries. Am I supposed to go home and tell my children that their civics teachers are wrong? Should our civics teachers tell our children it is the policy of the federal government to support people who knowingly buy stolen and illegally exported goods? Should they teach: "Just make sure that the goods were stolen in another country. Even if you know they are stolen and illegally exported the Government of the United States will protect you."

McClain and the Convention on Cultural Property Implementation Act

It has come to our attention that some people are arguing that McClain is redundant because the Congress enacted the Convention on Cultural Property Implementation Act. Indeed, we have even heard that some people are saying there was a deal to swap the Convention for overruling the McClain decision. Neither of these statements is true.

Less than three years ago we played a major part in supporting the enactment of the Convention on Cultural Property Implementation Act. At that time, Mr. Ewing, the president of the American Association of Dealers in Ancient, Oriental & Primitive Art in his testimony on the Convention Implementation Act specifically requested (on page 7 and 8) that the Senate Subcommittee on International Trade legislatively overrule the McClain decision. Subsequently, we, like all other proponents of the Convention, were asked by the American Association of Dealers in Ancient, Oriental & Primitive Art to support a legislative overruling of the McClain decision in exchange for their withdrawal of their opposition to the Convention on Cultural Property Implementation Act.

The response of the Society for American Archaeology was simple. We felt then, and continue to feel today, that McClain is good law. There would be no deals.

We saw, and continue to see, McClain as good law in two senses. As law it is good. That is, it is proper for the United States, under the principle of comity, to recognize the laws of other sovereign states. The world has numerous legal systems in it. If we wish to see our statutory and common laws recognized in foreign jursidictions, it is only fair that we recognize their codified laws in the United States. To take only one example, what do you think would be the impact on the willingness of foreign states to enforce U.S. laws dealing with the illegal export of militarily sensitive technology if we tell them we will not enforce their laws on the illegal export of items equally or more important to them?

More importantly for archaeologists, McClain is good law as public policy. We needed more, not fewer, tools to fight the plunder of archaeological resources. As the Senate Commerce Committee noted in its report accompanying the Convention on Cultural Property Implementation Act,

> "...[T]he demand for cultural artifacts has resulted in the irremedial destruction of archaeological sites and articles, depriving the situs countries of their cultural patrimony and the world of important knowledge or its past. Further, because the United States is a principal market for articles of archaeological or ethnological interest and of art objects, the discovery here of stolen or illegally exported artifacts in some cases severely strains our relations with the countries of origin, which often includes close allies."

These words were written less than three years ago. Nothing has really changed today. There is still a large illegal trade in antiquities. The United States is still a major market-place for people selling stolen artifacts. The looting that the illegal market stimulates still results in the destruction of sites and articles. It still deprives countries of their cultural patrimony and the world of important knowledge of the past.

Throughout our work on behalf of Title III or P.L. 97-446, we were aware that the Convention would only offer aid to State Parties to the Convention, and then only in certain limited situations. We were supporting the Convention on Cultural Property Implementation Act to provide a tool to supplement McClain — not to replace it. This new tool would provide the President standby authority to halt goods at the border in certain limited situations. Three specific situations were defined in the law:

> 1) where the cultural patrimony of a State Party to the Convention is in danger, the State Party has taken measures to protect its cultural patrimony, application of import restrictions in the context of a concerted international effort would be of substantial benefit in deterring pillage and less drastic remedies are not available, and application of import restrictions are consistent with the general interest of the international community;
>
> 2) where an emergency condition of crisis proportion exists with respect to a State Party to the Convention so that crucial newly discovered material, a site of high cultural significance, of part of the remains of a particular civilization would be pillaged, dismantled, destroyed, or fragmented; or
>
> 3) documented items from museums, public and religious monuments, or similar institutions in State Parties to the Convention are involved.

The limited scope of the tool that P.L. 96-446 was providing made McClain all the more important. This importance was discussed openly during the debate in 1982 and 1983. We knew then, just as we know today, that law-abiding citizens need every assistance in stemming the flood of stolen antiquities. So, needless to say, pleased when Senate Report 97-564, accompanying the Convention on Cultural Property Implementation Act, stated, on page 33, that:

> "Implementation of article 7(b) of the Convention affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and knowing receipt and transportation of stolen

property in interstate and foreign commerce (e.g., National Stolen Property Act, Title 18 U.S.C. Sections 2314-15), including the possible recovery of stolen property for the rightful owner in the courts without payment of compensation."

The Society for American Archaeology is 50 years old this year. We are a learned society. We pride ourselves on the scholarship of our members and on their efforts to share the excitement of what archaeology can teach with the public. As professionals, we also have an obligation to protect the cultural patrimony ot all nations. So we also are proud that for the past 50 years we have actively supported efforts to halt the looting and plundering of our world's archaeological resources.

The knowing possession of stolen and illegally exported artifacts is wrong. McClain is good law. S. 605 would be bad law. Why trade good law for bad law?

SOCIETY FOR AMERICAN ARCHAEOLOGY

Senator Paul Laxalt
Committee on the Judiciary
Chairman, Subcommittee on Criminal Law
United States Senate
Washington, DC 20510

2 August 1985

Re: S. 605

Dear Senator Laxalt:

Thank you very much for your leter of 3 July and for the opportunity to provide additional information of interest to your committee.

1.Do you feel that the McClain decision and existing restrictions adequately protect the cultural properties of other nations, or merely restrict this country from participating in the international trade of certain art objects?

The McClain decision and existing restrictions continue to be inadequate to protect the cultural properties of other nations because looting and an illegal market continue to exist. We regard the termination of looting for this purpose of illicit trade to be the appropriate standard of adequacy. Even if the McClain approach were only to be applied once again in similar circumstances, this would be a sufficient reason to sustain it. With regard to the participation of this country in the illegal marketplace, the demand worldwide is not infinitely expansive, hence there is no reason to believe that a reduction of U.S. demand for illegally-obtained materials would result in an increased participation by others. It is likely that an overall reduction in demand would result and the market would be depressed accordingly, providing a measure of reduced demand affecting the frequency of looting.

2. Even with the present tight restrictions on trading protected art objects, do you feel that the illegal destruction and trade of foreign art objects are increasing?

Given the illicit nature of this practice, it is difficult to gain a clear and accurate picture of changes in the rate of illegal destruction and trade worldwide. We do not regard the present restrictions as sufficiently tight to eliminate looting for the U.S. market, since looting continues to be a problem. It may be that present restrictions have created a situation where the illicit market is not expanding so that looting is not increasing, but as long as it continues unabated, clearly more stringent protection is needed.

3. What effect, if any, would passage of S. 605 have on foreign nations' willingness to permit archeological activity such as site excavation?

Virtually all international scholarly efforts are dependent upon the establishment of mutually-beneficial relations, cooperation and exchanges of information. Formal excavations by foreign scholars are no exception and are firmly grounded in good faith reciprocity. Further, scholarly studies are usually required to be non-destructive of the cultural resources, hence elaborate permitting procedures are often used to insure proper treatment of cultural properties. Certainly a failure to maintain bi-lateral relations could have a chilling effect on scholarly reciprocity with regard to cultural resources.

4. Do you view the UNESCO Convention or the National Stolen Property Act as the more important tool in preventing the looting of antiquities?

We are in essential agreement with others (such as the Senate Finance Committee) that these are both important preventive measures. Since they address different issues, they are essentially complementary, rather than in opposition.

5. If an object is discovered during an excavation that the archeologist wants to bring back to the U.S. for further study, how is permission obtained from the country that owns the object?

It is important to realize that while many different laws exist with regard to permitting the excavation and exportation (even on a temporary basis) of artifacts in other countries, the common pattern is for the host country to establish formal archaeological liason between foreign invesigators (under permit) and archaeological administrators in the host country. Excavations may be conducted under joint direction, for example, and the processing and treatment of artifacts in field situations will often be under joint supervision. Depending upon the particular permit requirements and the objects discovered, various levels of restriction on exportation may apply. Usually, a sense of scholarly responsibility exists, wherein the professional obligation of the foreign excavator is to assist in the development of local staff, facilities and institutions by providing training opportunities and other assistance to the host country, often including establishment of local capability for artifact curation and analysis (note that this reduces the need for removing most artifacts from the country of origin). Generally, the archaeologist must make formal application to take artifacts out of the country, details of which vary from country to country. I attach information regarding a publication which may provide more detailed information on these specific processes, should you wish to consult it. Most archaeologists wishing to conduct foreign excavations accept the necessity of conforming to the host country's requirements in this regard and the amount of scholarly analysis of excavated materials being conducted abroad has increased markedly. Generally these procedures pose few problems for the proper conduct of archaeological research in other countries and are accepted practices which respect the need to protect cultural resources for future study and appreciation.

Thank you very much for this opportunity to respond to questions.

It is important for the subcommittee to understand that we regard McClain and other existing regulations as necessary, but still insufficient to eliminate the destruction of archaeological information which looting for the illegal market produces.

It is important for the subcommittee to understand that archaeologists wishing to work in foreign countries (just as those who wish to excavate on most state and federal lands in this country) are required to fulfill the expectations of the host country, including permitting for excavation and exportation, permissions for access to research collections, etc. Legitimate scholars regard this as a reasonable requirement for the conduct of research. The most pressing need is not to acquire collections for permanent curation or display but to have appropriate access to them. In this situation, restrictions on access are common practices in the management of archaeological collections, both here and abroad. Please be assured that, by and large, legitimate scholarly research is not unduly restricted by UNESCO, McClain or most foreign regulations.

Sincerely,

Albert A. Dekin, Jr.
Chair, Governmental Affairs Committee

Associate Professor and Chair
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Binghamton, New York 13901

Dr. DEKIN. I would like to introduce Philip Speser, our Washington representative, who would be also pleased to respond to any inquiries with regard to the record of communications between our society and other interested parties with regard to previous legislation.

At a time when there is worldwide appreciation of cultural heritage, the importance of cultural roots and the tangible symbols thereof, it is very important that we respect the right of each nation to determine what is significant and important about its own cultural heritage in their own country.

Since standards for legal ownership will vary from country to country—the United States asserts its ownership of properties of significance on Federal lands, for example, while others do not—it is very important that we allow each country its sovereign right to make those declarations for themselves, consistent with their own legal systems.

The society also continues to respect the legal market and antiquities appreciation in this country and elsewhere, but we do not condone international theft. The testimony this morning seems to substantiate that present law has not restricted either legal trade nor the public benefit in most of these circumstances. Hence, we ask that the legislation being considered today not be supported.

The society's policy in legal affairs is consistent. The Cultural Property Implementation Act stood on its own merits as good law. This bill should fall on its own merits as bad law. Its adoption is not required to fulfill any sort of deal, agreement, arrangement or other discussion in circumstances dealing with previous legislation.

The Finance Committee, we would point out, has not endorsed or supported this action, and Senator Matsunaga no longer is a cosponsor. We urge no further action on this bill and ask that you not report it out of subcommittee. We ask that you let stand existing law and urge no amendments to the National Stolen Property Act which would weaken existing measures protective of archeological materials.

We would expect the members of this subcommittee to use their good sense in this regard. Thank you very much.

Senator LAXALT. Thank you.

Last, we will have the testimony of Maureen Robinson, legislative director of the American Association of Museums. Welcome.

STATEMENT OF MAUREEN ROBINSON

Ms. ROBINSON. Thank you. Thank you for providing the AAM with the opportunity to testify at this morning's hearings.

The American Association of Museums is a national service organization. It represents the interests and concerns of museum professionals, museums, and museum trustees. We are opposed to S. 605.

Our opposition stems from the longstanding commitment of the museum community to deter the theft of cultural property and the looting and destruction of archeological sites. In our view, S. 605 would contribute to these activities.

I must note for the record that although the goal of deterring the theft of property is unanimously supported by the members of the

museum community, clearly not all museums share our position on S. 605.

Passage of this bill would signal to other nations this country's lack of regard for their efforts to protect their cultural patrimony, and it would give U.S. citizens a right to disregard another country's laws with impunity.

In pursuing a narrow definition of ownership, the bill ignores the nature of cultural property and the vital interests of a nation in maintaining the physical as well as the narrative integrity of its history.

A xerox of the Declaration of Independence is not the same thing as the original document, with all of its history, symbolism and meaning. National patrimony laws are essential to many nations as a means for protecting their cultural heritage. By disregarding these laws as a basis for establishing ownership, we denude cultural objects of their significance and meaning to these countries.

Because cultural property is tangible, portable and can be owned in the commonsense, it is easy to think of it in the same light as a car or a head of cattle. An attempt to create the same standard of ownership would distort the meaning of this material to the country of origin.

The proposed legislation also exempts individuals who receive property knowing that a country has national patrimony laws and knowing that the property has been illegally removed from the country.

This provision encourages willful ignorance. Do not ask; you do not want to know; what you do not know cannot hurt you. But we should ask, because not asking questions about provenance encourages theft.

Museums are increasingly aware of the need to establish the provenance of these objects before acquiring them. In the written statement I have submitted for the record, I quote from the AAM's Museum Ethics, a report of the AAM Committee on Ethics which was adopted by the AAM membership in 1978.

It states in its section on collections:

> Illicit trade in objects encourages the destruction of sites, the violation of national exportation laws, and contravention of the spirit of national patrimony. Museums must acknowledge the relationship between the marketplace and the initial and often destructive taking of an object for the commercial market. They must not support that illicit market. Each museum must develop a method for considering objects of this status for acquisition that will allow it to acquire or accept an object only when it can determine with reasonable certainty that it has not immediately derived from this illicit trade and that its acquisition does not contribute to the continuation of that trade.

What is the purpose of S. 605? As it has been stated, it would avoid McClain-type prosecutions in the future. There was some concern in the museum community about the implications of a decision in the *McClain* case that was based on an 1897 Mexican statute that was ambiguous and that would have placed many of the museums and trustees in this country at risk.

The appeals court ruling resolved some of these concerns. In addition, in the 8 years since the *McClain* case, no museum director or trustee, much less any other individual, has been indicted for transporting stolen property across State lines.

In fact, two major exhibitions of Mayan art are about to begin touring this country, one show organized by the Peabody Museum at Harvard and the other by the American Museum of Natural History in New York.

These shows will travel across the country. A third show is in the process of being planned. The curatorial staff directors and trustees of these institutions have not been indicted, to my knowledge, and are not under investigation either.

S. 605 must be viewed in context. It is cited as a companion to the implementation act, and it is not. Its passage would surely have the effect of eroding the intent of the implementation act, as well as the series of treaties the United States has with Mexico, Peru, Ecuador, and Guatemala.

We have pledged our mutual cooperation in efforts to preserve their cultural patrimony and ours. S. 605 has the character of taking with one hand what is given with the other.

Finally, the shows mentioned earlier demonstrate the public benefits as well as the national benefit of U.S. efforts to curb the illicit trade of cultural material. The exhibition organized by the American Museum of Natural History will contain rare and important pieces of Mayan art. These are on loan from government museums in Mexico and Central America, and they are leaving their countries for the first time under conditions that are highly flattering to the United States and to United States museums.

I hope by citing these examples and giving you these reasons to have indicated to you what the AAM's reasons are for adopting its position and will now attempt to answer any questions you might have.

[The prepared statement and responses to written questions of Senator Laxalt follow:]

American
Association
of
Museums

Testimony

of

the

American Association of Museums

before a hearing of the

Committee on Judiciary

Subcommittee on Criminal Law

Mr. Chairman and members of the committee:

Thank you for the opportunity to testify on S. 605, a bill that would amend the National Stolen Property Act. The American Association of Museums, a national service organization representing the interests and concerns of museums, museum professionals and trustees, opposes the adoption of S. 605. Our opposition stems from the long-standing commitment of the museum community to deter the theft of cultural property and the looting and destruction of archeological sites. In the AAM's view, the proposed legislation would encourage the depredation of archeological sites and the illegal export of cultural material from its country of origin.

S. 605 would disregard for the purposes of the National Stolen Property Act declarations by foreign governments of national ownership with respect to archeological and ethnological materials as well as exempt from prosecution those individuals who acquire these materials knowing them to be illegally exported from and considered stolen by the country of origin. Passage of this law would in a single stroke signal to other nations this country's lack of regard for their efforts to protect their cultural patrimony and give U.S. citizens a right to disregard another country's laws with impunity. With the proposed amendments, the National Stolen Property Act would be transformed

from an instrument of law enforcement to one that encouraged the violation of laws elsewhere.

In pursuing a narrow definition of ownership, supporters of this bill ignore the nature of cultural property and the vital interests of a nation in maintaining the physical as well as the narrative integrity of its history. Although the United States has not felt the need to articulate a national policy with respect to our cultural patrimony, claims of a larger national interest, which declarations of national ownership represent, are not unknown to us. Many of the laws designed to protect the environment assert a national interest over individual or parochial interests; a similar set of principles informs our policies toward historic preservation. The diversity of our natural world and the history of our architecture are viewed as issues that involve larger questions than who owns the land, who holds the lease. The proposed legislation would have us discount the validity of such a judgment on the part of another nation with respect to its cultural patrimony. Cultural property because it is tangible would be viewed in the same light, and ownership held to the same standard, as that of a car, a head of cattle or a credit card. This narrow view of ownership may serve individual interests but it does not serve the museum community's interest, nor does it serve the national interest.

In addition to discounting a nation's declaration of ownership, the proposed legislation exempts individuals where "the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowledge of the illegal export and the defendant's knowledge of [a national claim of ownership]." This exemption removes any incentive an individual or institution might have to refrain from purchasing or receiving an object that has left its country of origin under questionable circumstances; the provision is an invitation to see no evil. Individuals and institutions are relieved of any legal necessity or obligation to inquire into the provenance of an object. This provision encourages a willfull ignorance on the part of collectors and will almost certainly contribute to increases in the trafficking of stolen property.

What is the purpose of S. 605? The bill has been introduced in order to avoid prosecutions under the National Stolen Property Act similar to the

McClain case. When the first decision was handed down in the McClain case the basis for the determination of guilt was the application of a claim of national ownership made by Mexico in 1897. At the time the decision was reached, many collectors and museums were alarmed by the potential for prosecution on the basis of this early and ambiguous declaration. Most museum collections with pre Columbian material were formed well after 1893. As a result of these concerns, the AAM Council adopted a resolution expressing concern over the implications of the decision for museums. An appeals court overturned the verdict citing the ambiguity of the 1897 declaration, but the court upheld the validity of national declarations of ownership as a basis for prosecution and viewed as acceptable for the purposes of prosecution in the McClain case a declaration of ownership adopted by Mexico in 1972, which the court viewed as unambiguous.

The appeals court decision resolved the concerns of many in the museum community. The fear of indiscriminate prosecutions of museum personnel and trustees for the interstate transportation of stolen property arising from loan exhibitions of archeological or ethnological materials proved to be without basis.

Over the years since the McClain decision, museums have made a concerted effort to improve acquisition procedures in order to assure that objects and materials accepted into collections have an acceptable provenance. Museum Ethics, a report of the AAM Committee on Ethics adopted by the AAM membership in 1978, states in the section on the collection:

> Illicit trade in objects encourages the destruction of sites, the violation of national exportation laws, and contravention of the spirit of national patrimony. Museums must acknowledge the relationship between the marketplace and the initial and often destructive taking of an object for the commercial market. They must not support that illicit market. Each museum must develop a method for considering objects of this status for acquisition that will allow it to acquire or accept an object only when it can determine with reasonable certainty that it has not been immediately derived from this illicit trade and that its acquisition does not contribute to the continuation of that trade.

In addition to avoiding future McClain-type prosecutions, S. 605 has also been cited as companion legislation to the implementation of the convention on cultural property (P.L. 97-446). In fact, it seriously erodes the intent of the implementation act, which provides one mechanism for the U.S. to assist in international efforts to control the illicit import, export and transfer of ownership of cultural property. In reporting the legislation to the Senate, the Finance Committee stated "implementation of article 7(b) of the Convention affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and knowing receipt and transportation of stolen property in interstate and foreign commerce (e.g., National Stolen Property Act, Title 18 U.S.C. Sections 2314-15)...." The implementation of the convention on cultural property was not meant to become the sole remedy for the theft or illegal exportation of archeological or ethnological material, but one of a number of means of discouraging their illicit trade. By excluding all declarations of national ownership, whatever their merit, as basis for prosecution under the National Stolen Property Act, S. 605 removes the NSPA as a legitimate means to a remedy.

In addition to subverting the intent of the implementation act, S.605 also erodes the significance of a series of treaties that the U.S. has with a number of its allies, including Mexico (1971), Peru (1981), Ecuador (1983), and Guatemala (1984). These treaties call for cooperation between the U.S. and these countries in mutual efforts to protect national patrimony. The enactment of S. 605 would make the U.S. appear to be taking with one hand what it gives with the other. Successful diplomatic relationships with other countries are dependent on cooperation in many areas, the cultural area being primary among them. S. 605, whatever else its intent, repudiates the national patrimony laws that other nations increasingly view as key to their capacity to protect their history.

The adoption of implementing legislation for the convention on cultural property sent an important signal to the rest of the world: the U.S., a major art importing country, was prepared to participate constructively in the efforts of other countries to preserve their cultural heritage. One outgrowth of the legislation with significant public benefit has been easing in restrictions on loans from foreign collections to U.S. museums for exhibitions and research. The changes proposed for the National Stolen Property Act would contradict much of what the U.S. has accomplished through the implementation of the convention and treaties. The bill also contradicts much of what museums have publicly supported in the last decade. S. 605 offers a protection that museums do not need and do not seek. For this reason the AAM urges the committee not to support passage of the bill.

S.605

Questions Submitted to Maureen Robinson

Question 1:

How did the American Association of Museums arrive at its position on this Legislation?

Answer:

The AAM's position on S.605 directly derives from the association's long established policies regarding the international trade in cultural property. These policies emphasize voluntary cooperation with other countries and respect for their laws, and call for museums to insure that their acquisitions do not derive from the illicit market. The principal statements of those policies are a resolution adopted by the membership in 1973 and the 1978 report of the AAM Committee on Ethics (published as Museum Ethics).

The 1973 resolution reads, in part:

> [The AAM] cooperate[s] fully with foreign countries in their endeavors to preserve cultural property and its documentation and to prevent illicit traffic in such cultural property. [The AAM] believe[s] that Museums can henceforth best implement such cooperation by refusing to acquire through purchase, gift, or bequest cultural property exported in violation of the laws obtaining in the countries of origin.

The pertinent section of Museum Ethics reads:

> Each museum must develop a method for considering objects...for acquisition that will allow it to acquire or accept an object only when it can determine with reasonable certainty that it has not been immediately derived from...illicit traffic and that its acquisition does not contribute to the continuation of that trade.

Museums in the United States, including the members of the American Association of Museums, are richly diverse and heterogeneous. Within the professional museum community, total unanimity of opinion on all issues will never be achieved. Indeed, some individual disagreement on the issues with which S.605 is concerned exists within the field. The AAM's positions and policies, however, are established by a consensus of its members, and it continues to stand by its 1973 resolution.

Question 2:

Are you aware of any current disputes over cultural property between foreign governments and U. S. museums? If so, would passage of this bill have any impact on these disputes?

Answer:

To our knowledge there is one current legal dispute, involving the government of Romania and the Kimbell Art Museum of Fort Worth, Texas. One or two other cases have been rumored, but unfortunately this is an area of museum activities that most institutions prefer not to make public.

Over the past ten years, there have been perhaps a half dozen occasions on which an object held by an American museum was claimed by a foreign government. However, in none of these cases do we have any information that the museum was threatened by prosecution under the NSPA. The disputes have been only in regard to the question of ownership: to our knowledge there was never any suggestion that the museums involved had knowingly participated in the theft of the materials from their rightful owner and subsequent transport across international boundaries. Therefore it seems unlikely that passage of S.605 would have any effect on these or any similar cases in the future.

In the past the question of rightful ownership has generally been resolved informally between the two parties, through thorough investigation of the merits of the claim and negotiated agreements. Examples of such amicable agreements include the return of a sculpture to India by the Kimbell Art Museum, the return of frescoes to Mexico by the Fine Arts Museums of San Francisco, the return of relief sculptures to Guatemala by the New Orleans Museum of Art, the return of wooden carvings to Ghana by the Denver Art Museum, the return of mosaics to Syria by the Newark Art Museum. All of these examples were the result of voluntary responses on the part of the museums involved. In some cases, for instance Denver and Newark, it was the museums themselves that identified the theft and initiated the return.

Such agreements can ultimately benefit a museum more than mere possession of the objects might have: the San Francisco Museum of Fine Arts, for example, now enjoys a long-term loan agreement with Mexico, and the New Orleans Museum of Art has a permanent loan from Guatemala.

In fulfilling their role as custodians and protectors of cultural heritage, museums have occasionally acted to facilitate the return of objects in private hands to the country of origin. For example, the National Museum of African Art, Smithsonian Institution, purchased the famous Afo-a-Kom statue from an art dealer in order to return it to Cameroon. As an expression of gratitude, the statue was allowed to return to the U. S. in 1984 as part of the travelling exhibition, "The Art of Cameroon."

The American Association of Museums supports and encourages the resolution of any disputes regarding ownership through professional approaches as described above.

Question 3:

What effect would passage of S.605 have on the ability of U. S. museums to expand their collections of ancient art?

Answer:

It is very difficult to imagine any circumstances in which a U. S. museum adhering to the ethical practices stated in the answer to Question 1, above, could be vulnerable to prosecution under the NSPA. As described above, there have been infrequent instances in which museums have unwittingly acquired objects claimed by a foreign nation, but the NSPA's requirement of scienter would seem to preclude its application in such cases. Therefore, passage of S.605 would probably have no beneficial effect on the collections of museums that follow professional ethical practices. S.605 would appear to benefit only those individuals who knowingly and intentionally trade in illegally acquired cultural property.

On the other hand, it is possible to imagine that passage of S.605 could have a detrimental effect on museums, as it is in direct opposition to the spirit of international respect and cooperation that encourages the legal movement of cultural property (see below).

Question 4:

Are any of the current national ownership laws overly protective and, if so, would you encourage mitigation of the problem?

Answer:

The laws of most countries regarding protection of their cultural patrimony are more restrictive than those of the U. S., but the AAM does not believe it is its role to recommend laws to other countries. Rather, the AAM advocates respect for the laws of all nations, just as it expects the international museum community to respect the laws of the U. S. To measure the laws of other nations by our standards is to ignore the world's cultural diversity; indeed, by the standards of many countries (including Canada and England), U. S. laws regarding its own cultural patrimony would be considered inadequately protective.

The experience of museums has shown that such respect and good faith efforts toward cooperation can lead to increased circulation of art treasures and even legal change. In recent years, such loan exhibitions as "Treasures of Tutankhamun" and "The Search for Alexander" have brought countless objects to the U. S. never before seen outside of their country of origin. Turkey has recently changed its antiquities law to enable materials to leave the country for exhibition: much will come to the U. S. for "The Age of Suleyman, the Magnificent," scheduled to open at the National Gallery of Art in early 1987. A new law in Peru will accomplish a similar purpose.

Senator LAXALT. Thank you very kindly.

Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Mr. Solley, you said that the rule of law enunciated in the *McClain* decision was unrealistic. Why do you have that view?

Mr. SOLLEY. I do not think that it is a realistic condition for museums or collectors to be exposed in our courts to the arbitrary or potentially arbitrarily created laws of ownership of foreign governments.

Most of the countries that fall within the purview of the cultural property protection are countries in the Third World, and many of them are countries in which the Government is less than scrupulous. And I just do not feel that it is a very sound thing for U.S. citizens and institutions to be placed in a position where they can be placed on the firing line and exposed to expensive litigation in defense of this sort of claim.

Senator MATHIAS. Let me ask Dr. Dekin or Ms. Robinson the other side of that question. Professor Bator in his statement earlier today said that if all that is shown is that the defendant illegally exported artifacts after a State enacted an umbrella vesting statute, and there is no evidence of where and when and how these objects were found and how they came into the possession of the defendant, using the NSPA seems inappropriate and undesirable even if the defendant knew of the existence of a statute.

Dr. DEKIN. I think that there are ways in which the role of such objects can be established within the cultural patrimony of such countries in the sense that while it is not necessarily essential that the property be linked to a particular piece of ground or source, it is fairly clear that the value of the objects is inherent in their identification as a piece of significant artifact or whatever, and that it is in that context that the knowledge, therefore, of its significance implies, I think, within it the knowledge that the artifact is worthwhile and comes from that particular setting.

I am not certain that that answers the direct aspect of your question, however.

Mr. SPESER. Could I address the question also, sir?

I think there are two facts that are important to keep in mind here. First of all, we are not talking about making something that is currently legal illegal. We are talking about making something that is currently illegal legal.

Second, I would point out that, first of all, as has been noted by several other people, there has not been any prosecution under this. So you have to ask what is all the smoke about?

Third, we are dealing with basically a highly sophisticated group of people. There is a legal market in antiquities. It does not seem an unreasonable burden to place upon a museum or a collector or a dealer to say, you are aware that there is an illegal and a legal market; please deal in the legal market, get the appropriate export licenses, and so on, and you will avoid all of the potential problems.

Mr. FITZPATRICK. Senator, could I comment on——

Senator MATHIAS. Let me just respond because he said what is all the smoke about. Now, Senator Moynihan tells you what all the smoke is about. He says,

In short, the personal and commercial risks have become so great that established art dealers are no longer willing to import such items. This, in turn, has injured American museums, collectors and scholars. Indeed, so zealous has Customs become that it recently indicated it would refuse to permit a gallery in New York to import for exhibition purposes only pre-Colombian Mexican objects that have been held in a private collection in Paris since 1929.

Now, that is the smoke.

Mr. SPESER. Well, again, I would point out, sir, in all due respect to Mr. Moynihan, that there have been no prosecutions, only a couple of investigations under this act; that there is a legal market in antiquities.

My offices are in DuPont Circle. You can go walk around DuPont Circle and see the antiquities that are being traded there. I am hoping that they are legal. It is the same thing in Mr. Moynihan's State of New York. You can go down into the Village in New York and look at the galleries and they are selling antiquities legally.

Nobody is talking about inhibiting a legal market. All we are doing is saying—it is very similar to the situation in the export of military-sensitive technology from the United States.

Basically, we are saying to other countries, we have a concern here. We ask you to respect our concern. And, in fact, under the Export Administration Act, as interpreted by the ITA regulations, to reexport from another country technology provided by the United States, you have got to get a license from the United States.

So if we are willing to ask that in something that is of key concern to us, and we are also willing to ask that in cases involving our own antiquities, should that come up, it does not seem very unreasonable that a Third World country should be able to come to the United States and say, hey, this was illegally stolen from us; we, unfortunately, are under great pressure from you people to fight communism, fight drugs, fight this, fight this, fight that. We are trying to get food for our people and we cannot afford to put a guard on every site; we just cannot afford it, and so please help us stem this illegal market. And if you guys would stop buying illegal antiquities, there would be that much less cash supporting looters in our country.

Mr. FITZPATRICK. Senator, in terms of where the smoke is, let me define two places where there is fire and smoke. First, our concern is that the State Department, since the passage of the cultural property law, has entered into two bilateral agreements with Guatemala, and now apparently with Ecuador, that flat out reject every one of the basic principles that we thought were reflected in national policy in the cultural property law.

The bilateral agreements are not multinational; they are not time-certain. They are not based on findings that the cultural property law contemplated. They do not go to specific items. There is no indication of national jeopardy.

They are across-the-board commitments on the part of State and Customs, which has resulted, as Mr. Abbey has indicated, in a virtual embargo—a chilling, as he nicely put it, of any importation of pre-Colombian cultural properties. That is one of our concerns.

We thought the Congress made a clear statement as to the rules of the road. State, however, relying on *McClain*—one Fifth Circuit

decision—is entering into bilateral treaties, and we think that that is inconsistent with the policies that Congress enunciated in 1983.

The second part of the smoke is the uncertainty in terms of these foreign laws. It is interesting that the Justice Department says that except for Mexico, most foreign nations have not passed appropriate statutes which are sufficiently enforced to give rise to such proof.

Apparently, Justice thinks that Mexico is the only country that has a sufficient statutory basis, but State says there are two dozen such countries. One such country is Guatemala. We entered into a treaty with Guatemala. They have this possessory interest in a constitution that was repealed, suspended, when the new government came in. We do not know what the situation is in Ecuador.

These foreign laws are basically a dog's breakfast. No one knows exactly what they say. We now understand that the Peruvian law applies only when someone takes a property out of the country; it is not an across-the-board grant of ownership. I think Mr. Maurer said it only applies when something is taken out.

So we do not see the certainty in the existence of these foreign laws that would permit museums to make informed judgments. We think that museums and institutions and dealers are at risk in terms of no certainty as to what *McClain* actually means because it incorporates amorphous and uncertain foreign law that is constantly in amendment.

Ms. ROBINSON. I think that the U.S. legal system must sometimes look like a dog's breakfast to people outside this country, and the fact that laws are confusing or difficult to interpret should not be any reason for providing blanket exceptions across the board for complying with them.

I think the individuals in the *McClain* case, as someone pointed out, were a highly unsavory group of individuals engaging in an activity that no one could really countenance. And I think that the courts have the full capacity to evaluate the validity for U.S. purposes of a foreign law in this area.

To eliminate all possibility of using that particular interpretation of these types of laws in U.S. courts would do a real disservice to the country and to our national reputation.

Senator MATHIAS. Of course, those interpretations often come after the fact.

Ms. ROBINSON. I am sorry. You mean, on appeal, the interpretations would change?

Senator MATHIAS. Yes, or the transaction has occurred before the court interprets a particular case.

Ms. ROBINSON. In many of these cases, people are basically receiving stolen property. I think you need to keep intact the ability to define ownership in a way that bring people who knowingly receive stolen property within the law.

Senator MATHIAS. In that connection, you mentioned that the American Association of Museums has a code of ethics. Do you know how many other museum systems in other countries have similar codes of ethics?

Ms. ROBINSON. Well, I think quite a few countries develop a code of ethics. I cannot say that it is universal. We participate in the International Council of Museums, and that is an international

body that attempts to define standards for museums around the world. But I could not absolutely declare to you that every country has a similar code of ethics.

I am very comfortable and very happy that the United States has one, and to the extent that we can, we act on it.

Senator MATHIAS. Would your code of ethics be in conflict with S. 605?

Ms. ROBINSON. I think to the extent that S. 605 permits people to ignore and disregard the laws of another nation and permits a kind of willful ignorance of the provenance of an object, and therefore contributes to the illicit trade in these cultural materials, yes, I think the code of ethics very clearly supports opposition to S. 605.

Senator MATHIAS. Thank you, Mr. Chairman.

Senator LAXALT. Thank you, Senator.

I think that concludes the testimony. We do have several written questions submitted by our colleagues, and please understand their not being here does not reflect any lack of interest. We are considering the defense bill on the floor, and that occupies the interest of several of our colleagues, including Senator Thurmond.

I would like the record also to state that Senator Specter was here and participated in the hearing; he had to leave to go to a juvenile justice hearing, which he was chairing.

The various questions will be submitted to the panelists here as well as the other panelists, and we would greatly appreciate answers to those questions.

I want to compliment staff in structuring this and all the members who have participated here. I think we have a marvelously good record that we can submit to our colleagues for ultimate determination.

Thank you very kindly.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned.]

APPENDIX

ARCHAEOLOGICAL INSTITUTE OF AMERICA
BOX 1901, KENMORE STATION, BOSTON, MA 02215

Statement on S.605

by

The Archaeological Institute of America

Professor James R. Wiseman, President

Dr. Ellen Herscher, Chair, Committee on Professional Responsibilities

submitted to the

Subcommittee on Criminal Law

For over one hundred years the Archaeological Institute of America has supported archaeological fieldwork and research in many countries and has responsibly communicated the results to the professional and avocational archaeologist, and to the general public. With nearly 10,000 lay and professional members and 85 local societies, the Institute also has a long-standing commitment to the preservation of archaeological resources throughout the world. It advocated U.S. ratification of the Convention on Cultural Property ever since UNESCO's adoption of that document in 1970 and it led the efforts that resulted in the enactment of the Convention on Cultural Property Implementation Act (CCPIA) by the 97th Congress.

While passage of the CCPIA was a central focus of AIA policy, the Institute also recognized that U.S. ratification of the Convention on Cultural Property would not and could not solve the entire problem. The destruction of archaeological resources is the end result of a complex economic and political system: any attempt to combat that destruction requires a multi-faceted approach and the flexibility to adapt available means to the situation at hand.

This view was confirmed during the many years of debate over the UNESCO Convention implementing legislation. While enactment was delayed, the crisis continued to escalate and other legal approaches began to be explored. Gradually a complex framework

of remedies began to develop that addressed the illicit traffic in antiquities in ways appropriate to its many dimensions. The McClain decision and its application of the National Stolen Property Act was a pivotal element in this development. For the first time, it was recognized in U.S. courts that some trafficking was fundamentally criminal in nature, not simply a technical violation of import/export regulations.

Two-and-one-half years after its passage, the CCPIA has so far had little practical effect. Although U.S. ratification of the UNESCO Convention prompted widespread international admiration, no substantive results have yet occurred. No other country has yet requested U.S. action under its provisions and the Advisory Committee appointed to oversee the law's applications has so far concerned itself with procedural matters.

The Archaeological Institute of America continues to actively support the control process represented by the Convention on Cultural Property and greatly values the principles of international cooperation upon which it is based. The Institute, however, also shares the understanding stated in Senate Report 97-564, accompanying the CCPIA, that the implentation of the Convention "affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and knowing receipt and transportation of stolen property in interstate and foreign commerce..." and sees no justification for abandoning a measure already proven to be an effective deterent to certain kinds of illicit actions.

Thus, in spite of assertions made by some supporters of S.605, the Archaeological Institute of America does not concur in the view that the CCPIA represents the sole and exclusive statement of U.S. policy on the illicit trade in cultural property. Nor has it ever agreed to support any initiatives, such as S.605, that attempt to chip away at the remedies currently being used to discourage such trade.

The Institute regards the McClain decision as a critical element in the framework of controls now being used to carry out

U.S. effort to cooperate with other countries in the protection of their cultural property. The fears among some that the precedent established in McClain would lead to a flood of indiscriminate prosecutions of innocent parties[1] has proven to be unfounded. The requirements for conviction under the NSPA are so stringent that it poses a threat only to those individuals whose actions are clearly criminal: they had knowledge of a country's laws and intentionally broke them. Certainly there can be no objective rationale for exempting cultural property from the legal protection provided to all other kinds of property.

The McClain decision has also not been followed by a rush of other countries declaring national ownership of archaeological materials. Instead, the past six years have seen an increased spirit of cooperation from antiquities-rich nations, manifested in such exhibitions as the current "Maya -- Treasures of an Ancient Civilization" in New York and "The Age of Suleyman the Magnificent" that will soon open in Washington (a direct result of liberalizing changes in Turkey's antiquities law). These large, comprehensive loan exhibitions are of considerably more educational value and interest to the American public than are permanently acquired single objects without provenance or even certain assurance of authenticity.

Some supporters of S.605 have asserted that "unilateral" U.S. prosecution under the NSPA is ineffective in protecting archaeological sites from looting, claiming that looted materials will simply make their way to other countries if they are not permitted to enter the U.S. Aside from the morality of such a position (Is it all right to break laws simply because others do it?), it does not stand up to logical scrutiny. The market for antiquities is not infinitely expandable. The U.S. is the richest country in the world and the principal market for many types of materials: if the U.S. restricts its import, the

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1. For example, James R. McAlee, "The McClain Decision: A New Legal Wrinkle for Museums," Museum News July/August 1979, pp. 37-41.

worldwide demand is thereby decreased. Looting of archaeological sites supplies that demand, and thus it also decreases, or at least may decrease. It has often been argued that, if an American does not buy a particular Peruvian pot, it is quite possible that a Japanese collector may. Perhaps; perhaps not. On the other hand, it is more likely that, if the American had bought the object, another would have been dug up to sell to the Japanese.

From its experience of excavation, education, and research around the world, the Archaeological Institute of America recognizes that cooperation is more constructive than confrontation, and follows a policy of respect for the diversity of human cultures, including laws of other nations that may not be identical to ours. Indeed, as the looting of archaeological sites in the American Southwest comes increasingly to public attention, it could even be argued that the U.S. could learn from the example of some other countries and act more vigorously to protect its own cultural heritage.

On December 27, 1970, the Council of the Archaeological Institute of America adopted a resolution supporting the UNESCO Convention on Cultural Property and urging prompt U.S. ratification of it. The last sentence of that resolution reads as follows:

> The Archaeological Institute of America applauds the efforts of local authorities, both in the United States and abroad, to prevent the despoliation of archaeological sites and the illicit export and import of antiquities and archaeological materials, and pledges its support in such efforts.

The Institute continues to hold that position and believes that the passage of S.605 would be in direct conflict with those aims.

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